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BY

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BY

R. W. LEE

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PREFACE

THIS volume contains those special rules which, in addition to the General Law of Contract, govern certain important transactions recognized by the Courts as bearing a distinctive character. As was suggested in the Preface to the preceding volume, most of these transactions are amongst the oldest contractual relationships recognized by English Law, and are, probably, the materials out of which the General Law of Contract has been built up by a long series of judicial decisions. It is not surprising, therefore, to find that they have been discussed by the Courts with a minuteness which renders possible a more complete treatment of them than of ordinary or "innominate" contracts.

The relationship between the rules governing Particular Contracts and the rules of the General Law of Contract is understood and applied almost unconsciously by experienced lawyers. But, for the benefit of any laymen or students who may read this work, special attention has been called to it in a Note which is placed conspicuously at the commencement of this Part (p. 159). As a matter of practice, a reader desiring information on the subject of any one of the contracts dealt with in this volume will naturally turn first to the special Section or Title dealing with it. If he there finds what he seeks, there will be no need to refer to the General Law. But if the point is not dealt with by the rules specially affecting the contract in question, he should refer to the preceding volume, where, in its due place in the scheme of the General Law of

Contract, the rule governing the point should be found. On the somewhat rare occasions on which the special rule is not merely supplementary of, but actually inconsistent with, the general principle, the special rule, of course, prevails.

Inasmuch as this volume deals with two of the very few topics on English Law which have passed through the process of statutory codification, the author and his colleagues have naturally borrowed in many cases the language of the codifying statutes; and they hasten to apologize for this plagiarism by expressing their indebtedness to the skilful draftsmen of the Sale of Goods Act and the Partnership Act, and acknowledging the courteous permission accorded by the Controller of H. M. Stationery Office to reprint from the text of those statutes. At the same time, in justice to the framers of the Acts and to themselves, they desire to call attention to the fact that they have not hesitated, whenever the plan of their work rendered such a course advisable, to state in their own language what they conceive to be the purport of the Acts.

The thanks of the Editor and his colleagues are again due to Mr. Nevile S. Done for his care in the matter of the Index. To Mr. E. Lewis Hopkins they are also indebted for the Tables of Statutes and Cases.

EDWARD JENKS.

September, 1906.

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ERRATA AND ADDENDA IN BOOKS I AND II (PART I)

BOOK I

Page 26. § 63 (note). The decision of the Court of Appeal in *Villar* v. *Gilbey* [1906] 1 Ch. 583, delivered since the publication of Book I, has rendered the statement in the note incorrect. The statement in the text remains, therefore, without qualification.

Page 27. § 65. It has been laid down in *Re Walker* [1905] 1 Ch. 160, that the unilateral conveyances by deed (? all conveyances *inter vivos*) of a lunatic so found, the inquisition not having been superseded, are void without further proof of unsoundness of mind. To this extent the note to § 67 requires modification.

Page 29. § 71 (a) (note). Add: "If a married woman *de facto* contracts as her husband's agent, even her property is not liable, whether the other party knew that she was acting as an agent, or not" (*Paquin* v. *Beauclerk* [1906] A. C. 148). (Lord Macnaghten (p. 164) thought it not even material whether the plaintiff did or did not know that the defendant was a married woman, if there was no misrepresentation by her.) This should, perhaps, also be noted under the exceptions enumerated in § 144.

Page 44. § 103. Notwithstanding the head note to the report of *Re Holland* [1902] 2 Ch. 360, it is conceived that *Ex parte Stephens* is still an authority for the exception in the first clause of the text. The older authority of *Higinbotham* v. *Holme* (1811) 19 Ves. 487, was referred to without disapproval by Stirling, L. J., in *Re Holland;* and the rule stated in the text was assumed by Phillimore, J., in *Re Johnson Johnson* [1904] 1 K. B. 134.

Page 72. § 158. Add note: "In *Agency Co.* v. *Short* (1888) L. R. 13 App. Ca. 793, it was held, on a colonial statute similar in wording to the English Real Property Limitation Act, 1833, that an owner who had been dispossessed of land by an intruder who abandoned possession before the expiry of the statutory period, acquired a new right of action when a subsequent intruder entered, even though he (the owner) had not in the meanwhile exercised any act of ownership."

Page 75. § 160. Add note: "Probably a payment will never be regarded as a promise to pay a statute-barred debt, unless expressly made by the debtor in part discharge of that debt" (*Re Boswell* [1906] 2 Ch. 359).

Page 77. § 165. Insert in text after "interest," the words — "and to claims to redeem a mortgagee in possession." And add as a separate note below "796" — "There is no exception for disabilities in the case of a mortgagor." *Kinsman* v. *Rouse* (1881) 17 Ch. D. 104; *Forster* v. *Patterson*, ib. p. 152.

BOOK II, PART I

Page 91. § 199. For the words "with the knowledge of the offeror," read "with knowledge of the offer."

Page 99. § 221 note (b). After "4th," insert "ed." (edition).

Page 113. § 260. Omit the words "at any time before action brought," and add to the authorities at the foot of the §, *Seymour* v. *Pickett* [1905] 1 K. B. 715.

NOTE TO BOOK II, PART II

The Particular Contracts dealt with in this Part are governed also by the General Law of Contract (Book II, Part I), so far as that Law is not inconsistent with the rules herein set forth.

BOOK II

OBLIGATIONS

PART II

OBLIGATIONS ARISING FROM PARTICULAR CONTRACTS

SECTION I

SALE

TITLE I—SALE OF GOODS

Definition

372. A contract of sale of goods is a contract whereby one person, "the seller," transfers or agrees to transfer the property in goods to another, "the buyer," for a money consideration, called "the price." There may be a contract of sale between one partowner and another.

Sale of Goods Act, 1893, s. 1.

Goods

373. "Goods" within the meaning of this Title include all chattels personal other than things in action and money. The term includes emblements (annual crops produced by labour), and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale.

Sale of Goods Act, 1893, s. 62.

Existing or future goods

374. The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale ("future goods").

Sale of Goods Act, 1893, s. 5. (1)

Sale over £10

375. In the case of a contract for the sale of goods of the value of £10 or upwards, the provisions of § 222 (Book II, Part I) apply.

Sale of Goods Act, 1893, s. 4. (1)

Non-existent goods

376. Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void.

Sale of Goods Act, 1893, s. 6.

Risk of loss

377. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer (§ 386), the agreement is thereby avoided.

Sale of Goods Act, 1893, s. 7.

Price

378. The price in a contract of sale may be fixed by the contract, or may be left to be fixed in man-

ner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact in each case.

Sale of Goods Act, 1893, s. 8.

Sale at a valuation

379. Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party does not or cannot make such valuation, the agreement is avoided; but if the goods, or any part thereof, have been delivered to, and appropriated by, the buyer, he must pay a reasonable price therefor. Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Sale of Goods Act, 1893, s. 9.

Conditional sale

380. Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated. Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to

a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to the latter effect.

Sale of Goods Act, 1893, s. 11 (1).

[For conditions and warranties see further, Book I, §§ 109–120, and Book II, Part I, §§ 305–307, 339.]

Implied terms

381. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

(1) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;

(2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Sale of Goods Act, 1893, s. 12.

Sale by description

382. Where there is a contract for the sale of goods by description, there is (subject to § 411) an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description.

Sale of Goods Act, 1893, s. 13.

Quality and fitness

383. Subject to the provisions of this Title and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: —

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are

of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. But, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. But if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed;

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(4) An express warranty or condition does not negative a warranty or condition implied by this Title unless inconsistent therewith.

Sale of Goods Act, 1893, s. 14.

Sale by sample

384. A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. In the case of a contract

for sale by sample, the following conditions are implied, viz.: —

(*a*) That the bulk shall correspond with the sample in quality;

(*b*) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(*c*) That the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Sale of Goods Act, 1893, s. 15.

Duties of seller and buyer

385. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Sale of Goods Act, 1893, s. 27.

Risk

386. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. But where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. Nothing in this § affects the duties or liabilities of

either seller or buyer as a bailee of the goods of the other party.

Sale of Goods Act, 1893, s. 20.

Delivery and payment

387. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Sale of Goods Act, 1893, s. 28.

Delivery

388. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and, if not, his residence; except that, if the contract be for the sale of specific goods, which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery. But —

(*a*) Where under the contract of sale the seller is bound to send the goods to the buyer, and no time for sending them is fixed, the seller is bound to send them within a reasonable time;

(*b*) Where the goods at the time of sale * are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf;

(*c*) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact;

(*d*) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

[* This is the wording of the Act; but surely "contract of sale" is meant.]

Sale of Goods Act, 1893, s. 29.

Mis-delivery

389. Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. But if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate.

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different

description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole of the goods.

The provisions of this § are subject to any usage of trade, special agreement, or course of dealing between the parties.

Sale of Goods Act, 1893, s. 30.

Delivery by instalments

390. Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Sale of Goods Act, 1893, s. 31.

Delivery to carrier

391. Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods

to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *primâ facie* deemed to be a delivery of the goods to the buyer. But —

(*a*) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages ;

(*b*) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and, if the seller fails to do so, the goods are deemed to be at his risk during such sea transit.

Sale of Goods Act, 1893, s. 32.

Distant delivery

392. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, never-

theless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Sale of Goods Act, 1893, s. 33.

Examination of goods

393. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them, unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. And unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods, for the purpose of ascertaining whether they are in conformity with the contract.

Sale of Goods Act, 1893, s. 34.

Acceptance of goods

394. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Sale of Goods Act, 1893, s. 35.

Rejection of goods

395. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller. It is sufficient if he intimates to the seller that he refuses to accept them.

Sale of Goods Act, 1893, s. 36.

Failure to accept delivery

396. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. The rights of the seller in such a case are additional to and independent of his rights where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Sale of Goods Act, 1893, s. 37.

[Presumably this section of the Act only refers to a buyer who improperly refuses or neglects to accept delivery.]

Unpaid seller

397. The seller of goods is deemed to be an "unpaid seller" within the meaning of this Title—

(*a*) When the whole of the price has not been paid or tendered;

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional

payment, and the condition on which it was received has not been fulfilled, by reason of the dishonour of the instrument or otherwise.

In §§ 398–406 the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Sale of Goods Act, 1893, s. 38.

Remedies of unpaid seller

398. Subject to the provisions of this Title, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law —

(*a*) a lien on the goods (*i. e.* right to retain them) for the price, while he is in possession of them;

(*b*) in case of the insolvency of the buyer, a right of stopping the goods *in transitû* after he has parted with the possession of them;

(*c*) a right of re-sale as limited by this Title.

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery, similar to and co-extensive with his rights of lien and stoppage *in transitû* where the property has passed to the buyer.

Sale of Goods Act, 1893, s. 39.

Lien

399. Subject to the provisions of this Title, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: —

(*a*) Where the goods have been sold without any stipulation as to credit;

(*b*) Where the goods have been sold on credit, but the term of credit has expired;

(*c*) Where the buyer becomes insolvent.

The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Sale of Goods Act, 1893, s. 41.

Part delivery

400. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Sale of Goods Act, 1893, s. 42.

Loss of lien

401. The unpaid seller of goods loses his lien thereon —

(*a*) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;

(*b*) When the buyer or his agent lawfully obtains possession of the goods;

(*c*) By waiver thereof.

The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment for the price of the goods.

Sale of Goods Act, 1893, s. 43.

Stoppage in transitû

402. Subject to the provisions of this Title, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitû;* that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Sale of Goods Act, 1893, s. 44.

Duration of transit

403. Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee. If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges

to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end; and it is immaterial that a further destination for the goods may have been indicated by the buyer.

If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitû*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

Sale of Goods Act, 1893, s. 45.

Process of stoppage

404. The unpaid seller may exercise his right of stoppage *in transitû*, either by taking actual posses-

sion of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

When notice of stoppage *in transitû* is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Sale of Goods Act, 1893, s. 46.

Transfer of buyer's rights

405. Subject to the provisions of this Title, the unpaid seller's right of lien or stoppage *in transitû* is not affected by any sale, or other disposition of the goods, which the buyer may have made, unless the seller has assented thereto.

But, where a document of title to goods has been lawfully delivered to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid

seller's right of lien or stoppage *in transitû* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitû* can only be exercised subject to the rights of the transferee.

Sale of Goods Act, 1893, s. 47.

Resale

406. Subject to the provisions of this Title, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage *in transitû*. But —

(*a*) Where an unpaid seller who has exercised his right of lien or stoppage *in transitû* re-sells the goods, the buyer acquires a good title thereto as against the original buyer;

(*b*) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods, and recover from the original buyer damages for any loss occasioned by his breach of contract;

(*c*) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby

rescinded, but without prejudice to any claim the seller may have for damages.

Sale of Goods Act, 1893, s. 48.

Action for price

407. Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods; and where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

Sale of Goods Act, 1893, s. 49.

Action for non-acceptance

408. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

Where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the

time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Sale of Goods Act, 1893, s. 50.

Remedies of buyer. Action for non-delivery

409. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

Where there is an available market for the goods in question, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Sale of Goods Act, 1893, s. 51.

Breach of warranty

410. Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not, by reason only of such breach of warranty, entitled to reject the goods; but he may —

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

In the case of breach of warranty of quality, such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer, and the value they would have then had if they had answered to the warranty.

The fact that the buyer has set up the breach of warranty in diminution or extinction of the price, does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

Sale of Goods Act, 1893, s. 53.

Special agreement

411. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Sale of Goods Act, 1893, s. 55.

Sales by auction

412. In the case of a sale of goods by auction —

(*a*) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale ;

(*b*) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid;

(*c*) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself, or to employ any person to bid, at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer;

(*d*) A sale by auction may be notified to be subject to a reserved price; and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

Sale of Goods Act, 1893, s. 58.

Sale by way of security

413. The provisions of this Title relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Sale of Goods Act, 1893, s. 61 (4).

TITLE II—SALE OF LAND

Definition

414. A contract of sale of land is a contract whereby one party ("the vendor") agrees to transfer an existing estate or interest in land to another party ("the purchaser") for a money consideration, called "the price." There may be a contract of sale between one part-owner and another.

Statute of Frauds

415. No contract of sale of land which does not satisfy the requirements of §§ 220–221 (Book II, Part I) is enforceable by action.

Statute of Frauds (1677) s. 4.

Price

416. In a contract of sale of land the parties may alternatively: —

(*a*) fix a price;

(*b*) provide for the price to be ascertained in manner thereby agreed;

(*c*) stipulate for a fair price.

Fry, *Specific Performance* (4th ed.) s. 354.

When the price is to be ascertained, the contract is *primâ facie* conditional upon the price being as-

certained in the way prescribed. Upon such ascertainment of the price the contract becomes absolute.

Milnes v. *Gery* (1807) 14 Ves., at p. 408.
London Guarantie Co. v. *Fearnley* (1880) L. R. 5 App. Ca., at p. 920.

What is a fair price is a question of fact dependent on the circumstances of each particular case.

Price to be fixed

417. Where there is a contract to sell land on the terms that the price is to be fixed by the valuation of a third party, and such third party does not make such valuation, the contract is avoided.

Milnes v. *Gery, ubi sup.*

[Where the third party is prevented from making the valuation by the fault of the vendor or purchaser, the party not in fault may (probably) maintain an action for damages against the party in fault. At least, in *Smith* v. *Peters* (1875) L. R. 20 Eq. 511, Sir G. Jessel, M. R., granted a mandatory order to compel the vendor to allow the valuer to enter.]

"Open" contract

418. A contract of sale of land may contain any terms agreed upon by the parties which are not contrary to law. If the parties have merely agreed to sell and purchase without expressing the terms upon which the sale is to take place ("open contract of sale") the provisions of the following §§ apply.

Good title

419. In every contract of sale of land, in the absence of agreement to the contrary, there are an

implied condition and warranty (Book II, Part I, § 342) that the vendor will make a good title to the property contracted to be sold.

Ogilvie v. *Foljambe* (1817) 3 Mer. 531.
Doe d. Gray v. *Stanion* (1836) 1 M. & W., at p. 701.
Ellis v. *Rogers* (1885) 29 Ch. D. 661.

Disclosure of defects

420. In the absence of agreement to the contrary, a vendor must disclose to a purchaser any material defect in the title to the property which is exclusively within his knowledge, and which the purchaser could not with reasonable care discover for himself.

Stevens v. *Adamson* (1818) 2 Stark. 422.
Molyneux v. *Hawtrey* [1903] 2 K. B. 487.
Carlish v. *Salt* [1906] 1 Ch. 335.

[*Quaere*, whether this liability extends to defects in the subject-matter.]

Construction of contract

421. In every contract of sale of land it is (in the absence of agreement to the contrary) implied that the vendor undertakes —

(*a*) to convey the whole interest in the land which he is legally competent to convey;

Bower v. *Cooper* (1842) 2 Ha. 408.

(*b*) to convey a freehold estate of fee simple;

Cattell v. *Corrall* (1840) 4 Y. & C., at p. 236.
Hughes v. *Parker* (1841) 8 M. & W. 244.

(*c*) to convey free from incumbrances.

Gatayes v. *Flather* (1865) 34 Beav. 387.
Ogilvie v. *Foljambe* (1817) 3 Mer., at p. 65.
Re Bettesworth & Richer (1883) 37 Ch. D. 535.

But these implications do not (in the absence of agreement to the contrary) arise when circumstances negativing them are known to the purchaser.

Cox v. *Middleton* (1854) 2 Drew., at p. 216.
Cato v. *Thompson* (1882) 9 Q. B. D. 616.
Gloag's and Miller's Contract (1883) 23 Ch. D. 320.
Ellis v. *Rogers* (1885) 29 Ch. D., at p. 666.

Subject-matter

422. In every contract of sale of land it is *primâ facie* implied that the interest contracted to be sold —

(*a*) carries with it rights of access to the land and other incidents necessary to its enjoyment;

Stanton v. *Tattersall* (1853) 1 Sm. & G. 529.
Denne v. *Light* (1857) 8 De G. M. & G. 774.

[At least in the absence of such incidents of ownership the Court will not compel specific performance. "To do so would be to compel the purchaser to pay for what he would not have the means of enjoying." (*Denne* v. *Light*, at p. 784.) The cases cited are silent as to the effect of such a contract at Common Law.]

(*b*) comprises rights of ownership *usque ad cœlum et ad inferos.*

Pope v. *Garland* (1841) 4 Y. & C., at p. 403.
Sparrow v. *Oxford* (1852) 2 De G. M. & G., at p. 110.
Bellamy v. *Debenham* [1891] 1 Ch. 412.
Laybourn v. *Gridley* [1892] 2 Ch. 53.
Jackson's & Haden's Contract [1905] 1 Ch. 603; [1906] 1 Ch. 412.

[On a sale of copyhold land, minerals and timber are *primâ facie* excluded, these being usually by the custom of the manor the property of the lord and not of the tenant.]

But a contract of sale of land to a railway company under the Railways Clauses Consolidation Act,

1845, or to undertakers under the Waterworks Clauses Consolidation Act, 1847, does not include the minerals, other than such as may be necessary to be dug, used, or carried away in the construction of the contemplated works, unless they are expressly comprised in the purchase.

Railway Clauses Consolidation Act, 1845, s. 77.
Waterworks Clauses Consolidation Act, 1847, s. 18.

Duties of vendor

423. In the absence of provision to the contrary, it is the duty of the vendor —

(*a*) to show and make a good title to the property agreed to be sold;

Ellis v. *Rogers* (1885) 29 Ch. D. 661.

[See Addendum to this Title.]

(*b*) upon payment or tender of the purchase money and interest, if any, and all outgoings and expenses, if any, properly payable by the purchaser, to execute, and procure the execution by all other necessary parties (if any) of, a proper conveyance vesting the legal and equitable ownership in the purchaser;

Poole v. *Hill* (1840) 6 M. & W. 835.
Costigan v. *Hastler* (1804) 2 Sch. & L., at p. 166.
Rayner v. *Preston* (1881) 18 Ch. D. per Brett L. J., at p. 11.

(*c*) upon such payment or tender as aforesaid, to give or tender possession to the purchaser, if he has not already obtained it;

Bennet v. *Stone* [1903] 1 Ch. 509.
Plews v. *Samuel* [1904] 1 Ch. 464.

(*d*) upon completion, to hand over to the purchaser all title deeds in the possession or power of the vendor, except such as relate also to other property retained by the vendor;

Bryant v. *Busk* (1827) 4 Russ. 1.
Duthy's and Jesson's Contract [1898] 1 Ch. 419.
Conveyancing Act, 1881, s. 9. (*Quære*, can a trustee-vendor be called upon to give more than an acknowledgment?)

[In respect of the latter, a covenant or a statutory acknowledgment and undertaking must be given.]

(*e*) to take reasonable care of the property [a] and to pay the outgoings [b] until the purchaser takes or ought to take possession;

(a) *Lysaght* v. *Edwards* (1876) 2 Ch. D., at p. 507.
Clarke v. *Ramuz* [1891] 2 Q. B. 456.
(b) *Carrodus* v. *Sharp* (1855) 20 Beav. 56.
Barsht v. *Tagg* [1900] 1 Ch., at p. 234.

(*f*) in or concurrently with the conveyance to enter into proper covenants for title and any other usual covenants.

Earl Poulett v. *Hood* (1868) L. R. 5 Eq. 115.
Ricketts v. *Bell* (1847) 1 De G. & Sm., at p. 345.
Blakeney v. *Hardie* (1874) I. R. 8 Eq., at 390.

[Express covenants for title are not now inserted; the Conveyancing Act, 1881, s. 7, having provided that such covenants shall be implied from the use of appropriate words in the deed of conveyance, *e.g.* in a conveyance for valuable consideration from the use of the words "as beneficial owner."]

Duties of purchaser

424. In the absence of provision to the contrary, it is the duty of the purchaser: —

(*a*) within a reasonable time after proof of the vendor's title, to prepare a proper conveyance and tender it to the vendor for execution;

Poole v. *Hill* (1840) 6 M. & W. 835.

(*b*) upon the execution of the conveyance by the vendor and all other necessary parties, to pay to the persons entitled the purchase money and interest (if any);

Poole v. *Hill, ubi sup.*

[Formerly, where the vendor was a trustee for third parties, it was generally the duty of a purchaser to see that the money paid by him was duly applied for the benefit of the beneficiaries under the trust. But now, by s. 20 of the Trustee Act, 1893 (amplifying former legislation), the receipt in writing of a trustee is a sufficient discharge. When there are several trustees, all must concur in giving receipts (*In re Flower* (1884) 27 Ch. D. 592). Similar provisions as to the receipts of trustees under the Settled Land Acts are contained in the Settled Land Act, 1882, s. 40. Purchasers from mortgagees, even where there was a joint account clause, were formerly bound to satisfy themselves that the joint tenancy had not been severed. This is now rendered in most cases unnecessary by the Conveyancing Act, 1881, ss. 22 & 61. Formerly purchasers from an heir or beneficial devisee, when the land was charged with debts or legacies, were bound to see to the application of the purchase money. This is now rendered in most cases unnecessary by the Land Transfer Act, 1897, which makes realty (other than legal interests in copyholds) devolve in the first instance upon the personal representatives, who have the same powers, rights, duties, and liabilities with regard to it as in the case of chattels real.]

(*c*) upon completion, to take possession of the property so as to relieve the vendor from all future liabilities incident to the ownership;

Fry, *Specific Performance* (4th ed.) s. 1396.

(*d*) to enter into proper covenants for performance of future liabilities relating to the property, when the vendor remains liable in respect thereof;

[*E. g.* the purchaser of a lease is bound to covenant to pay the rent and perform the covenants, and indemnify the vendor against liability upon them. (*Pember* v. *Mathers* (1779) 1 Bro. C. C. 52). So a purchaser of freeholds subject to restrictive covenants. (*Moxhay* v. *Inderwick* (1847) 1 De G. & S. 708; *Poole's & Clarke's Contract* [1904] 2 Ch. 173).]

(*e*) if he desires to investigate the vendor's title, or to make requisitions or objections, to do so within a reasonable time after the delivery of a complete abstract of title.

Seton v. *Slade* (1802) 7 Ves. 278.

Disclosure by purchaser

425. A purchaser is not (in the absence of special circumstances) bound to disclose any fact exclusively within his knowledge which, if known to the vendor, might be expected to affect the price of the subject of the sale.

Walters v. *Morgan* (1861) 3 De G. F. & J. 718.
Coaks v. *Boswell* (1886) L. R. 11 App. Ca., at p. 235.

Risk of deterioration

426. The loss resulting from any accidental injury to the property happening after the date of the contract falls on the purchaser.

Lysaght v. *Edwards* (1876) 2 Ch. D., at p. 507.
Poole v. *Shergold* (1786) 2 Bro. C. C. 118.
Rayner v. *Preston* (1881) 18 Ch. D. 1.

[In the absence of special agreement, the vendor is not bound to keep up existing insurances on the property for the benefit of the

purchaser; nor is he a trustee for the purchaser of moneys recovered by him from the insurers. (*Rayner* v. *Preston*, *ubi sup.*) If the insurer has paid money to the vendor in respect of a loss occurring after the date of the contract, he may (generally) recover the amount from the purchaser. (*Phœnix Co.* v. *Spooner* [1905] 2 K. B. 753.)]

Sales by auction

427. When land is sold by auction, the particulars or conditions of sale must state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved. If it is stated that such land will be sold without reserve, or to that effect, then the seller may not employ any person to bid at such sale, nor may the auctioneer knowingly take any bidding from any such person.

Sale of Land by Auction Act, 1867, s. 5.

Right to bid

428. Where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, the seller or any one person on his behalf may bid at such auction in such a manner as he may think proper.

Sale of Land by Auction Act, 1867, s. 6.

Contracts of tenancy

429. Any contract whereby one party agrees to create an estate or interest in land in favour of another for a money consideration is governed by the rules relating to contracts of sale of land, so far as the same are applicable.

430. A contract of sale of land within the meaning of this Title does not include an agreement to create a mortgage. *Mortgages*

ADDENDUM

It is beyond the scope of this work to enter upon a discussion of title to land. Without doing this, the statement in the text (§ 423 (*a*)), that the vendor must show and make a good title to the property to be sold, may be amplified as follows. The vendor must — .

(1) *show a good title*, *i. e.* at his own expense deliver to the purchaser an "abstract" (*i. e.* a summary of documents and events) showing a sufficient right to convey (*Souter* v. *Drake* (1834) 5 B. & Ad. 995; *Doe d. Gray* v. *Stanion* (1836) 1 M. & W., at p. 701). By a "good title" is meant a title deduced from the legal period of commencement, and complete in all other respects. It is sufficient to show a good equitable title, with the power to get in the legal estate by the time appointed for completion (*Camberwell* v. *Holloway* (1879) 13 Ch. D., at p. 763).

(2) *make a good title*, *i. e.* at his own expense verify his "abstract" by producing all the abstracted documents in his possession, and procuring, at the purchaser's expense, the production of all such documents as are not in his possession, and supplying all other evidence necessary to establish the title shown in the abstract. Incidentally, the vendor must duly answer and comply with all proper requisitions on title made by the purchaser.

With respect to the legal period of commencement of title, the following rules may be noted.

(1) A purchaser may generally claim to have the title traced back over a period of forty years next before the date of the contract (Vendor and Purchaser Act, 1874, s. 1).

(2) In the absence of stipulation to the contrary, the purchaser of a term of years may not call for the title to the freehold (*ib.* s. 2.)

(3) The purchaser of a term granted by underlease has not the right (unless expressly reserved) to call for the title to the leasehold reversion (Conveyancing Act, 1881, s. 3 (1) (9)).

(4) The purchaser of an interest in land converted by enfranchisement from copyhold or customary tenure into freehold has not the right (except by agreement) to call for the title to make the enfranchisement (*ib.* s. 3 (2) (9)).

The purchaser in every case may require the vendor to go back to "a good root of title," *i. e.* "to some instrument of disposition dealing with, or proving on the face of it (without the aid of extrinsic evidence), the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified, and showing nothing to cast any doubt on the title of the disposing parties." (Williams, *Vendor and Purchaser*, Vol. I. p. 87)].

SECTION II

HIRE

Definition

431. A contract of hire is a contract whereby one person ("the letter") agrees to allow another ("the hirer") to use goods for a limited time for a valuable consideration. The contract has no application to land.

Defects in subject-matter

432. When the contract is for the hire of a specific thing, the letter is not responsible for the consequences of defects of which he was unaware at the time of the hiring;[a] but when the selection of the thing is entrusted to the letter, it is the duty of the letter to supply to the hirer a thing as reasonably fit and proper for the purpose for which, to the knowledge of the letter, it was intended to be used, as care and skill can make it.[b]

(a) *Robertson* v. *Amazon Tug Co.* (1881) 7 Q. B. D. 598. (See however the dissenting judgment of Bramwell, L. J., in this case.)
(b) *Hyman* v. *Nye* (1881) 6 Q. B. D. 685.
(But see *Vogan & Co.* v. *Oulton* (1898) 79 L. T. 384.)

Keep of animals hired

433. If an animal is hired, the duty of feeding it *primâ facie* falls on the hirer.

Handford v. *Palmer* (1820) 2 Brod. & Bing., at p. 360.
Reading v. *Menham* (1832) 1 Moo. & Rob. 234.

Duties of hirer

434. In the absence of agreement to the contrary, it is the duty of the hirer: —

(*a*) to take reasonable care of the goods hired.[a] Reasonable care in a hirer is such care as a prudent man may be expected to take of his own property of the same kind;[b]

(a) *Sanderson* v. *Collins* [1904] 1 K. B. 628.
(b) *Dean* v. *Keate* (1811) 3 Camp. 4.
Batson v. *Donovan* (1820) 4 B. & Ald., at p. 30.

(*b*) to use the thing hired only for the purpose and time agreed;

Coggs v. *Bernard* (1704) 2 Ld. Raym. 915.
Burnard v. *Haggis* (1863) 14 C. B. N. S. 45.

(*c*) to restore the thing at the time fixed for the expiration of the hiring, or, where no time is fixed, within a reasonable time after notice requiring him to do so;

Coggs v. *Bernard*, *ubi sup.*, at p. 916.

(*d*) to restore the thing in the condition in which it was received, fair wear and tear excepted. But this duty does not arise if the thing hired has perished, been lost, or has deteriorated, without default on the part of the hirer;

Cooper v. *Barton* (1810) 3 Camp. 5 (n.)

(*e*) to perform the consideration agreed upon.

435. In the absence of agreement to the contrary, the offspring of a female animal hired, born during the hiring, belongs to the owner of the animal. *Offspring of animals hired*

[It is difficult to find express authority for this statement; but it is believed that it represents the law.]

SECTION III

LOAN

TITLE I—LOAN OF GOODS

Definition

436. A contract of loan of goods is a contract whereby one person ("the lender") allows or agrees to allow another ("the borrower") to use goods for a limited time without valuable consideration.

Promise of loan

437. A promise to lend goods is not binding unless it is under seal.

[This follows from the general rule of English Law. (See §§ 203 & 213, Book II, Part I.)]

Latent defects

438. In the absence of agreement to the contrary, it is the duty of the lender to make known to the borrower any latent defect known to him in the thing lent, which is likely to render it perilous to the borrower if used for the purpose for which the lender knows that the loan is accepted. If the borrower suffers loss by reason of the lender's non-disclosure of such defect, he is entitled to damages.

Blakemore v. *Bristol & Exeter Ry. Co.* (1858) 8 E. & B., at p. 1050.
MacCarthy v. *Young* (1861) 6 H. & N. 329.
Coughlin v. *Gillison* [1899] 1 Q. B. 145.

439. In the absence of agreement to the contrary, it is the duty of the borrower: *Duties of borrower*

(*a*) to exercise such care and skill with regard to the thing lent as a prudent man would exercise. This includes the exercise of special skill where special skill is required;

Isaack v. *Clark* (1614) 2 Bulstr. 306.
Vaughan v. *Menlove* (1837) 3 Bing. N. C. 468.
Wilson v. *Brett* (1843) 11 M. & W. 113.
Grill v. *General Iron Screw Co.* (1866) L. R. 1 C. P., at p. 612.

[The dictum in *Coggs* v. *Bernard:* that exceptional care is required from a gratuitous borrower, seems never to have been acted upon.]

(*b*) to use the thing lent for the purpose and time only for which it was lent;

Coggs v. *Bernard* (1704) 2 Ld. Raymond, at pp. 915, 916.

(*c*) to restore the thing lent (*quære*, together with the increments, if any,) at the time agreed, or within a reasonable time after demand;

Coggs v. *Bernard, ubi sup.*
Story, *Bailments*, §§ 257, 260.

(*d*) to restore the thing lent in the condition in which it was at the time of the lending (reasonable wear and tear excepted). But this duty does not arise if the thing lent has perished, been lost, or has deteriorated without default on the part of the hirer.

Blakemore v. *Bristol & Exeter Ry. Co.* (1858) 8 E. & B., at p. 1050.

440. Unless a contrary intention is expressed or implied, the right to use the thing lent is personal *Borrower's rights not transferable*

to the borrower; and the borrower will be responsible for any loss which may arise from the fact that he has permitted another person to use it.

Bringloe v. *Morrice* (1687) 1 Mod. 210.
Camoys v. *Scurr* (1840) 9 C. & P. 383.

Determination of loan

441. The lender may demand the return of the thing lent at any time, even though the loan was expressed to be made for a definite period.

Story, *Bailments*, §§ 257, 258, 271.

TITLE II—LOAN OF MONEY

Definition

442. A contract of loan of money is a contract whereby one person ("the lender") pays or agrees to pay consideration of a promise by another ("the borrower") to pay money in return, upon demand or at a fixed or ascertainable date. If the contract contains an agreement for interest, the provisions of §§ 266–268 (Book II, Part I) apply.

Contract to lend or borrow

443. The breach of a contract to lend [a] or to borrow [b] money gives rise to an action for damages. The measure of damages is the loss sustained by the one party in consequence of the other's default.

(a) *Manchester Oldham Bank* v. *Cook* (1884) 49 L. T. 674.
Western Wagon Co. v. *West* [1892] 1 Ch. 271.
(b) *Rogers* v. *Challis* (1859) 27 Beav. 175.
Sichel v. *Mosenthal* (1862) 31 L. J. Ch., at p. 389.

Not specifically enforceable

444. A contract to lend [a] or to borrow [b] money is not specifically enforceable.

(a) *South African Territories Co.* v. *Wallington* [1898] A. C. 309.
(b) *Rogers* v. *Challis, ubi sup.*

[*Quære*, if and how far a contract to lend is affected by an alteration for the worse in the financial position of the borrower.]

Remedies of lender

445. In the case of a breach of the borrower's promise to repay, the provisions of § 273 (Book II, Part I) apply.

Money at bank

446. Money lodged with a banker in the ordinary course of business is deemed to be on loan to the banker by the customer.

Foley v. *Hill* (1848) 2 H. L. C. 28.
Pott v. *Clegg* (1849) 16 M. & W. 321.

[And therefore recovery is barred after the expiration of six years (Book I, § 159 (*b*)). *Pott* v. *Clegg*, *ubi sup.*).]

Professional money-lenders

447. Transactions by way of loan by a professional money-lender, entered into since 31st October, 1900, or in respect of which any agreement or security has been made or taken since that date, are subject to revision by the Court in the exercise of its discretion, either when the creditor attempts to enforce his claims by action or proof in bankruptcy, or on the application of any party liable for repayment of the loan.

Money-lenders Act, 1900, s. 1.

SECTION IV

DEPOSIT

448. In this Title, a contract of deposit means a contract whereby one person ("the depositor") places in the custody of another ("the depositee" or "depositary") goods or other movables to be kept by the latter for the former, either gratuitously or for reward. *Definition*

449. A depositee, in the absence of agreement to the contrary, is bound: — *Duties of depositee*

(*a*) to exercise reasonable care and skill in regard to the property deposited. What is reasonable care depends upon the circumstances of each case; but, in the absence of special circumstances, the following rules apply: — (*a*) *Care and skill*

Butler v. *The Swan Electric Engraving Co.* (1906) XXII. T. L. R. 275.

(i) A depositee for reward is bound to exercise such care and skill as a prudent man would exercise in the circumstances. This includes the exercise of special skill where special skill is required;

Brabant & Co. v. *King* [1895] A. C., at p. 640.

(ii) A gratuitous depositee is bound to exercise such skill as he has, and such care as a reasonably prudent and careful man takes of his own property of the like description ;

Coggs v. *Bernard* (1704) 2 Ld. Raym. 909.
Doorman v. *Jenkins* (1834) 2 A. & E. 256.
Beal v. *South Devon Ry. Co.* (1864) 3 H. & C. 337.

(iii) A depositee professing a particular trade, business, or calling, is bound to exercise the degree of care and skill usual and requisite in such trade, business, or calling.

Wilson v. *Brett* (1843) 11 M. & W. 113.
Scarborough v. *Cosgrove* [1905] 2 K. B. 805.

(*b*) *No user* (*b*) to deal with the thing deposited only in the manner authorized by the depositor ;

Lilley v. *Doubleday* (1881) 7 Q. B. D. 510.

(*c*) *Restoration* (*c*) to allow the depositor at any time on demand to take possession of the thing deposited, together with any increase or profits accrued to it.

Wilkinson v. *Verity* (1871) L. R. 6 C. P. 206.
Re Tidd [1893] 3 Ch. 154.
Story, *Bailments*, § 99.

[A depositee is generally estopped from denying his depositor's title. On the other hand, he has no defence against a rightful owner. In a case of disputed title, his proper course is to interplead. As against the depositor claiming re-delivery, it is a good defence that the depositee has been evicted by title paramount. But a depositee cannot justify retaining the deposit as against the depositor, unless he does so by the authority of some third person, whose title he must prove (*Biddle* v. *Bond* (1865) 6 B. & S. 225).]

450. A finder of goods who undertakes the custody of them is bound to take the same care of them as a gratuitous depositee. *Finder*

Doctor and Student, Dial. 2, c. 38.
Isaack v. *Clark* (1614) Bulst. 306, 312.

[*Quære*, whether he is entitled to receive from the owner compensation for expenses properly incurred in relation to them. He has no lien for such expenses. (*Binstead* v. *Buck* (1777) 2 Wm. Bl. 1117; *Nicholson* v. *Chapman* (1793) 2 H. Bl. 254).]

451. A mere depositee has, as a rule, no lien for his charges in the absence of express agreement; (a) but a wharfinger has a special,(b) and may by local custom have a general lien (c) for his charges as wharfinger, and bankers have a general lien on all securities deposited with them as bankers by a customer, unless there is an express contract, or circumstances that show an implied contract, inconsistent with the lien.(d) *Lien of depositee*

(a) *Yorke* v. *Grenaugh* (1704) Ld. Raymond, 868.
Judson v. *Etheridge* (1833) 1 C. & M. 743.
Jackson v. *Cummins* (1839) 5 W. & M., at p. 349.
(b) *Moet* v. *Pickering* (1878) 8 Ch. D. 172.
(c) *Holderness* v. *Collinson* (1827) 7 B. & C. 212.
(d) *Brandas* v. *Barnett* (1846) 12 Cl. & F., at p. 806; *London Chartered Bank of Australia* v. *White* (1879) L. R. 4 App. Ca., at p. 422.

[A "special" lien is confined to the articles in respect of which the charges were incurred; a "general" lien extends to charges incurred in respect of other goods of the same depositor.]

452. A person to whom goods are consigned by mistake, or otherwise without his authority, incurs *Unauthorized consignment*

no liability to the consignor merely by receiving them.

Lethbridge v. *Phillips* (1819) 2 Stark. 544.
Howard v. *Harris* (1884) 1 Cab. & El. 253.

Pledge

453. This Section has no application to a deposit as security for a loan or other liability.

SECTION V

EMPLOYMENT

TITLE I — MASTER AND SERVANT

Definition

454. A contract of service is a contract whereby one person ("the servant") agrees for a wage or other valuable consideration to work subject to the orders of another ("the master"), who agrees to employ him.

R. v. *Shinfield* (1811) 14 East, at p. 547.

Voluntary service

455. The mere fact that one person serves another, raises no presumption that he does so in pursuance of a contract of service.

R. v. *Thames Ditton* (1785) 4 Dougl. 300.
Foord v. *Morley* (1859) 1 Fost. & F. 496.

Domestic relationship

456. The mere existence of domestic relationship between the parties raises no presumption for or against the existence of a contract of service.

Davies v. *Davies* (1839) 9 C. & P. 87.

Statute of Frauds

457. A contract of service, which must extend beyond one year from the making thereof, is not

enforceable by action unless it is in writing (*supra*, § 220, Book II, Part I).

Bracegirdle v. *Heald* (1818) 1 B. & Ald. 722.
Banks v. *Crossland* (1874) L. R. 10 Q. B. 97.

Retainer

458. The master must receive the servant into his service [a] and retain him as his servant for the time agreed; [b] but, in the absence of express or implied agreement, the master need not find work for his servant to do.[c]

(a) *Hochster* v. *De la Tour* (1853) 2 E. & B. 678.
(b) *Lilley* v. *Elwin* (1848) 11 Q. B. 742.
(c) *Lagerwall* v. *Wilkinson* (1899) 80 L. T. 55.
Turner v. *Sawdon* [1901] 2 K. B. 653.
Devonald v. *Rosser* (1906) XXII., T. L. R. 682.

Wages or reward

459. The master must pay his servant his wage, and perform any other consideration agreed. Where no wage or other consideration is expressly agreed to be paid or performed, the servant is entitled to receive a reasonable reward for his services, if such was the intention of the parties.

Bryant v. *Flight* (1839) 5 M. & W. 114.

Medical attendance

460. The master need not provide his servant with medical attendance or medicine, unless he has agreed to do so.

Newby v. *Wiltshire* (1785) 4 Dougl. 284.
Wennall v. *Adney* (1802) 3 B. & P. 247.
Sellen v. *Norman* (1829) 4 C. & P. 80.
Cooper v. *Phillips* (1831) 4 C. & P. 581.

[No general rule can be laid down with regard to providing food. It is a matter of usage, depending on the nature of the service.]

461. The master is not bound to give his servant or former servant a testimonial as to character. *Testimonials*

Carrol v. *Bird* (1800) 3 Esp. 201.

462. In the absence of agreement to the contrary, the master is entitled to any earnings accruing to his servant in the course of his service. *Servants' earnings*

Co. Litt. 117 a (ed. Hargrave & Butler) note 161.
Thompson v. *Havelock* (1808) 1 Camp. 527.
Morison v. *Thompson* (1874) L. R. 9 Q. B., at p. 482.

[*Semble*, an action will not lie at the suit of a master against a third party to recover the servant's earnings, unless the servant acted as his master's agent (*Treswell* v. *Middleton* (1623) Cro. Jac. 653).]

463. The servant must enter upon his service and continue in it for the time agreed. *Duties of servant*

Bird v. *Randall* (1762) 3 Burr. 1345.
Richards v. *Hayward* (1841) 2 M. & G. 574.

464. The servant must serve his master faithfully,[a] and obey his lawful commands.[b] *Obedience*

(a) *Turner* v. *Robinson* (1833) 5 B. & Ad., at p. 790.
Robb v. *Green* [1895] 2 Q. B., at p. 10.
(b) *The King* v. *St. John, Devizes* (1829) 9 B. & C., at p. 900.
Turner v. *Mason* (1845) 14 M. & W. 112.

465. If the servant is engaged for skilled labour, and he has, expressly or by implication, held himself *Warranty of skill*

out as having the necessary skill, he is liable if he does not possess and exercise it.

Harmer v. *Cornelius* (1858) 5 C. B. N. S. 236.

Betrayal of confidence

466. The servant may not, during his service or after its termination, use, to the prejudice of his master, confidential information or materials obtained by him in the course of his service. If he does so, he may be restrained by injunction, and is also liable in damages.

Merryweather v. *Moore* [1892] 2 Ch. 518.
Lamb v. *Evans* [1893] 1 Ch. 218.
Robb v. *Green* [1895] 2 Q. B. 315 (C. A.).
Louis v. *Smellie* (1895) 73 L. T. 226 (C. A.).

[*Semble*, a person who, after the termination of his service, solicits the customers of his former master, does not thereby incur liability, unless he makes use of information or materials improperly obtained during the course of his service (*Helmore* v. *Smith* (1886) 35 Ch. D., at p. 456; *Irish* v. *Irish* (1888) 40 Ch. D., at p. 51; *Robb* v. *Green* [1895] 2 Q. B., at p. 13).]

Indemnity of servant

467. The master is bound to indemnify his servant for all expenses, loss, or liability, incurred by the servant in obeying the master's lawful orders, or in doing at the master's orders any act which is not obviously unlawful, and which the servant was induced by his master's conduct to believe to be lawful.

Adamson v. *Jarvis* (1827) 4 Bing., at p. 72.

468. The servant is bound to indemnify his master against loss or liability incurred by the master to third persons in consequence of the servant's wrongful act or default. *Indemnity of master*

Pritchard v. *Hitchcock* (1843) 6 M. & G., at p. 165.

469. The duration of a contract of service is fixed by the agreement of the parties or by usage. *Duration of contract*

[There was formerly a presumption that an indefinite hiring was a yearly hiring, at least in the case of agricultural labourers and domestic and menial servants; but it is doubtful how far the presumption exists at the present day (Co. Litt., 42 b; *Beeston* v. *Collyer* (1827) 4 Bing. 309; *Fawcett* v. *Cash* (1834) 5 B. & Ad. 904; *Baxter* v. *Nurse* (1844) 6 M. & G. 935; *Lilley* v. *Elwin* (1848) 11 Q. B. 742; *Fairman* v. *Oakford* (1860) 5 H. & N. 635).]

470. An agreement to pay a quarterly,[a] monthly,[b] or weekly [c] wage is not necessarily conclusive as to the duration of the hiring. *Periodical wage*

(a) *Beeston* v. *Collyer* (1827) 4 Bing. 309.
(b) *Davis* v. *Marshall* (1861) 4 L. T. 216.
(c) *Rex* v. *Great Yarmouth* (1816) 5 M. & S. 114.

471. The engagement of domestic or menial servants is determinable by either party at any time on giving a month's notice, and by the mas- *Month's notice*

ter on paying or tendering a month's wage in lieu thereof.

Fawcett v. *Cash* (1834) 5 B. & Ad., at pp. 908–909.
Nowlan v. *Ablett* (1835) 2 C. M. & R. 54.
Moult v. *Halliday* [1898] 1 Q. B., at p. 129.

[The servant is not entitled to any compensation for loss of board (*Gordon* v. *Potter* (1859) 1 F. & F. 644).

The term "menial" is wider than and includes "domestic." "No general rule can be laid down as to who do and who do not come within the category of menial servants." (*Nicoll* v. *Greaves* (1864) 33 L. J. C. P. 259.)]

Reasonable notice

472. Other engagements for an indefinite period are determinable by reasonable notice. What is a reasonable notice is a question of fact dependent on usage and circumstances.

Creen v. *Wright* (1876) 1 C. P. D. 591.

[There seems to be some authority for saying that a hiring for an indefinite number of periods, *e.g.* a yearly or monthly hiring, is determinable only by notice expiring at the end of one of such periods. But where there is a hiring for one definite period, no notice to determine at the end of such period is necessary, even though the contract contemplates a possible continuance of the hiring (*Langton* v. *Carleton* (1873) L. R. 9 Ex. 57).]

Breach by servant

473. If the servant wilfully disobeys [a] or habitually neglects [b] the lawful commands of his master, is grossly incompetent,[c] absents himself from service,[d] is guilty of gross misconduct,[e] or otherwise acts in a manner incompatible with the due and faithful discharge of his duty,[f] he may be dismissed by the

master without notice or compensation.[g] If the servant's wage is payable at fixed periods, the servant is not entitled to payment of any portion of an instalment which has not become due at the time of such dismissal.[h] The same rule applies if the servant wrongfully quits his service without notice.[i]

(a) *Turner* v. *Mason* (1845) 14 M. & W. 112.
(b) *Callo* v. *Brouncker* (1831) 4 C. & P. 518.
(c) *Harmer* v. *Cornelius* (1858) 5 C. B. N. S. 236.
(d) *Robinson* v. *Hindman* (1800) 3 Esp. 235.
(e) *Callo* v. *Brouncker* (*ubi sup.*).
Atkin v. *Acton* (1830) 4 C. & P. 208.
(f) *Turner* v. *Robinson* (1833) 5 B. & Ad., at p. 907.
Pearce v. *Foster* (1886) 17 Q. B. D. 536.
(g) *Lilley* v. *Elwin* (1848) 11 Q. B. 742.
Boston Deep Sea Co. v. *Ansell* (1888) 39 Ch. D. 339.
(h) *Turner* v. *Robinson* (1833) 5 B. & Ad. 789.
Boston Deep Sea Co. v. *Ansell*, *ubi sup.*, at p. 364.
(i) *Walsh* v. *Walley* (1874) L. R. 9 Q. B. 367.
Lamburn v. *Cruden* (1841) 2 M. & G. 253.

[The degree of misconduct which will justify dismissal is a question of fact (*Clouston* v. *Corry* [1906] A. C. 122.)]

Illness of servant

474. The servant may be dismissed if, from sickness or any other cause, he becomes for a considerable time or permanently unable to perform his duties. But if the servant is not dismissed, the master is not, in the absence of agreement, entitled to make any deduction from the agreed wage in respect of such sickness or incapacity,[a] nor to charge the servant for medicine and medical attendance procured for the servant by the master.[b]

(a) *Cuckson* v. *Stones* (1859) 1 E. & E. 248.
(b) *Sellen* v. *Norman* (1829) 4 C. & P. 80.

Damages for wrongful dismissal

475. The servant who is wrongfully dismissed may recover compensation for services under the contract rendered and not paid for (*quantum meruit*), and also recover damages for loss of prospective wages; but, in estimating the latter, the jury must take into account the value of any other employment which the servant may obtain or has already obtained.

Brace v. *Calder* [1895] 2 Q. B. 253.

Ground of dismissal

476. In an action for wrongful dismissal, it is a sufficient defence if the master can show that a good ground for dismissal did at the time of such dismissal exist, even though the master may have alleged another ground of dismissal,(a) or may have been unaware that such ground of dismissal existed.(b)

(a) *Baillie* v. *Kell* (1838) 4 Bing. N. C. 638.
Spotswood v. *Barrow* (1850) 5 Exch. 110.
(b) *Willets* v. *Green* (1850) 3 C. & K. 59.

Death of party

477. A contract of service is determined by the death of either master or servant.

Farrow v. *Wilson* (1869) L. R. 4 C. P. 744.
Stubbs v. *Holywell Ry. Co.* (1867) L. R. 2 Ex. 311.

[Presumably where a contract of hiring and service is determined by the death of master or servant, or otherwise without default on either side, in the absence of agreement or custom to the contrary the servant or his representatives will be entitled to payment in respect of services rendered up to the time of determination (*Cutter* v. *Powell* (1795) 6 T. R. 320. Apportionment Act, 1870, s. 2).]

Bankruptcy of master

478. In the absence of express agreement, a contract of service is not determined by the bankruptcy of the master.

Thomas v. *Williams* (1834) 1 Ad. & E. 685.

[*Quære*, whether, in the case of partner employers, the dissolution of the partnership or the death of one partner dissolves a contract of hiring and service (*Hobson* v. *Cowley* (1858) 27 L. J. Ex. 205; *Tasker* v. *Shepherd* (1861) 6 H. & N. 575; *Brace* v. *Calder* [1895] 2 Q. B. 253).]

Gratuitous service

479. A promise to serve another gratuitously, not being under seal, is not enforceable; and gratuitous service may be determined by either party without notice.[a] But, so long as the relationship of master and servant in fact exists, the rights and duties of the parties towards one another and towards third persons[b] are governed by the law affecting the contract of service, so far as the same is applicable.

(a) *Lees* v. *Whitcomb* (1828) 5 Bing. 34.
Sykes v. *Dixon* (1839) 9 A. & E. 693.

(b) *Keane* v. *Boycott* (1795) 2 H. Bl. 512.
Evans v. *Walton* (1867) L. R. 2 C. P. 615. (But see *De Francesco* v. *Barnum* (1890) 45 Ch. D., at p. 443.)

TITLE II — MASTER AND APPRENTICE

Definition

480. A contract of apprenticeship is a contract whereby one person ("the master") undertakes to teach another ("the apprentice") his trade or business, and to employ him therein, and such other person undertakes to learn the trade or business and to serve his employer in it.

Rex v. *King's Lynn* (1826) 6 B. & C. 97.
Rex v. *Crediton* (1831) 2 B. & Ad. 493.

Statute of Frauds

481. A contract of apprenticeship, which must extend beyond one year from the making thereof, is not enforceable by action unless it is in writing (*supra*, § 220, Book II, Part I).

Statute of Frauds (1677) s. 4.

[In practice, contracts of apprenticeship are always in writing, and usually in writing under seal. By such "indentures of apprenticeship" the apprentice and some one or more of his relations and friends usually covenant that he shall faithfully serve his master and obey his lawful commands. The master on his part covenants to teach.]

Infant apprentice

482. An infant may contract to become an apprentice, and will be liable, if the contract is for his benefit, for the amount of any premium he has

contracted to pay;[a] but he cannot be sued on his contract to serve.[b] The other parties to the contract are not released by his refusal.[c]

(a) *Walter* v. *Everard* [1891] 2 Q. B. 369.
(b) *Gylbert* v. *Fletcher* (1629) Cro. Car. 179.
(c) *Cuming* v. *Hill* (1819) 3 B. & Ald. 59.

Duty of master

483. The master must employ the apprentice, and teach him the trade or business to which the apprentice has been apprenticed.

Ellen v. *Topp* (1851) 6 Ex. 424.

Apprentice's earnings

484. The master is entitled to all the earnings of the apprentice.

The King v. *Wantage* (1801) 1 East, 601.
Thompson v. *Havelock* (1808) 1 Camp. 527.
The King v. *Bradford* (1813) 1 M. & S. 151.
Foster v. *Stewart* (1814) 3 M. & S., at p. 200.

[If an apprentice has worked for a third person who knows that he is an apprentice, the master may maintain an action against such third person to recover compensation for the apprentice's work and labour (*Foster* v. *Stewart*, *ubi sup.*).]

Duty of apprentice

485. The apprentice must act faithfully towards his master, and obey his lawful commands.

Domestic apprentices

486. When the apprentice lives with his master, the master must provide him with necessary food, medical attendance, and medicine.

Reg. v. *Smith* (1837) 8 C. & P. 153.

Wages of apprentice

487. In the absence of express agreement, the apprentice is not entitled to wages.

1 Bl. *Comm.* 428.

Death of party

488. A contract of apprenticeship is determined by the death of master or apprentice.

Baxter v. *Burfield* (1747) 2 Stra. 1266.

Return of premium on death

489. If a premium has been paid for or by the apprentice, there is no duty, in the absence of special agreement, to return the whole or any part of it on the death of master or apprentice.

Whincup v. *Hughes* (1871) L. R. 6 C. P. 78.

Bankruptcy of master

490. Where, at the time of the presentation of a bankruptcy petition, any person is apprenticed or is an articled clerk to the bankrupt, the adjudication of bankruptcy is, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum

as the trustee, subject to an appeal to the Court, thinks reasonable, out of the bankrupt's property, to or for the use of the apprentice or the clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy, and to the other circumstances of the case.

Bankruptcy Act, 1883, s. 41.

Return of premium on bankruptcy

491. When it appears expedient to a trustee, he may, on the application of any apprentice or articled clerk to the bankrupt, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the provisions of the last §, transfer the indenture of apprenticeship or articles of agreement to some other person.

Ibid.

Misconduct of apprentice

492. The master may not determine the contract of apprenticeship on the ground of the apprentice's misbehaviour,(a) unless in the case of habitual theft,(b) or (?) other gross misconduct.

(a) *Winstone* v. *Linn* (1823) 1 B. & C. 460.
(b) *Cox* v. *Mathews* (1861) 2 F. & F. 397.
Learoyd v. *Brook* [1891] 1 Q. B. 431.

Parish and marine apprentices

493. The provisions of this Title do not apply to parish apprentices, nor to apprentices to the sea service or sea fishing service, except in so far as they are not inconsistent with the Acts of Parliament specially relating to such apprentices.

TITLE III—WORK AND LABOUR

Definition

494. In this Title a contract of work and labour means a contract whereby one person ("the employee") agrees to work for another ("the employer"), but not as servant, apprentice, or agent.

Gratuitous work

495. A promise to work for another gratuitously (not being a specialty) creates no legal liability; but, if the promisor commences the work promised, he is liable if he does not use reasonable care, skill, and diligence in so much of it as he performs.

Coggs v. *Bernard* (1704) 2 Ld. Raym. 915.
Elsee v. *Gatward* (1793) 5 T. R. 143.
Wilkinson v. *Coverdale* (1793) 1 Esp. 74.

Quantum meruit

496. When no reward is expressly agreed to be paid in respect of work, it is a question of fact in each case whether the work is to be remunerated.

Reason v. *Wirdnam* (1824) 1 C. & P. 434.
Lamburn v. *Cruden* (1841) 2 M. & Gr. 253.
Harrison v. *James* (1862) 7 H. & N. 804.
Hutton v. *West Cork Ry. Co.* (1883) 23 Ch. D., at p. 667.

Statute of Frauds

497. A contract of work and labour which must extend beyond one year from the making thereof

is unenforceable by action unless it is in writing (Book II, Part I, § 220).

Statute of Frauds (1677) s. 4.

Duty of employer

498. It is the duty of the employer to render the reward agreed, or, where the amount of the reward is not fixed, but the work was intended to be remunerated, to render a reasonable reward.[a] Whether it is also the duty of the employer to provide employment for the employee, is a question of fact, to be decided according to the circumstances of each case.[b]

(a) *Brown* v. *Nairne* (1839) 9 C. & P. 204.
Hughes v. *Lenny* (1839) 5 M. & W., at p. 193.
(b) *Fechter* v. *Montgomery* (1863) 33 Beav. 22.
Ex parte Maclure (1870) L. R. 5 Ch. App. 737.
Turner v. *Sawdon* [1901] 2 K. B., at p. 659.
Devonald v. *Rosser & Sons* (1905) 93 L. T. 274.

Duty of employee

499. It is the duty of the employee to perform the work agreed in the manner and for the time agreed, and to use reasonable care, diligence, and skill in performing it, including any such skill as he professed to have at the time of contracting.

Clarke v. *Earnshaw* (1818) Gow, 30.
Harmer v. *Cornelius* (1858) 5 C. B. N. S. 236.

Breach of confidence

500. It is an implied term in any contract of work and labour, which involves confidential relations

between the parties, that the employee will not, during the employment or after its termination, make an unfair use of information or materials which he has acquired in the course of, and in consequence of his employment. Breach of this implied term entitles the injured party to compensation in damages, and also to an injunction.

Tuck v. *Priester* (1887) 19 Q. B. D. 629.
Pollard v. *Photographic Co.* (1888) 40 Ch. D. 345.
Lamb v. *Evans* [1893] 1 Ch. 218.

[An injunction will also be granted in similar circumstances against third parties who have obtained information or materials through the employee (*Prince Albert* v. *Strange* (1848) 2 De G. & Sm. 652).]

Lien of employee

501. The employee who has bestowed labour and skill, or has expended money, upon a chattel bailed to him, has a lien upon it for his charges in respect thereof.

Scarfe v. *Morgan* (1838) 4 M. & W., at p. 283.
Ex parte Willoughby (1881) 16 Ch. D., at p. 610.

[The lien is created, even though the employer is not the owner of the chattel, if he had authority (express or implied) for the employment. (*Keene* v. *Thomas* [1905] 1 K. B. 136).]

Lien dependent on possession

502. The employee's lien in respect of goods in his possession does not extend to claims in respect of goods which are no longer in his possession, unless both the goods in his possession, and the goods no

longer in his possession, were bailed to him under one contract.

Blake v. *Nicholson* (1814) 3 M. & S. 167.
Chase v. *Westmore* (1816) 5 M. & S. 180.

Employment on credit

503. If an employee has agreed to give credit after the completion of the work, he has, in the absence of express agreement, no right of lien in respect of the goods bailed to him.

Raitt v. *Mitchell* (1815) 4 Camp. 150.

Payment by instalments

504. In the absence of agreement or custom to the contrary, work and materials (if any) must be paid for by the employer as they are rendered and provided. In such a case, if the continuation of the work becomes impossible,[a] or if the workman refuses to complete it,[b] he is nevertheless entitled to be paid for so much of the work as he has actually carried out.

(a) *Menetone* v. *Athawes* (1764) 3 Burr. 1592.
Appleby v. *Myers* (1867) L. R. 2 C. P., at p. 660 (per Blackburn, J.).
(b) *Roberts* v. *Havelock* (1832) 3 B. & Ad. 404.

[An agreement to do the whole work for a lump sum will usually be construed as an agreement that the employee is not to be paid anything until the whole work is complete (*Appleby* v. *Myers*, *ubi sup.*).]

505. In the case of workmen as defined in § 506, the payment of wages otherwise than in current coin of the realm, and deductions from wages, are prohibited, subject to the provisions and exceptions of the Truck Acts, 1831, 1887, and 1896. *Payment in kind*

Truck Acts, 1831, s. 1; 1887, s. 10; 1896, ss. 1–4.

[The prohibition even extends to the deduction of damages awarded by a court to the employer against the workman (*Williams* v. *North's Navigation Collieries* [1906] A. C. 136).]

506. The expression "workman" in § 505 does not include a domestic or menial servant; but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be express or implied, oral or in writing, and whether it be a contract of service or a contract personally to execute any work or labour. *"Workman"*

Truck Act, 1887, s. 2 (incorporating by reference the definition of "workmen" in the Employers and Workmen Act, 1875).

Squire v. *Midland Lace Co.* [1905] 2 K. B. 448.

[For the meaning of "employers" and "wages" within this § see Truck Act, 1831, s. 25.]

Payment of wages in public houses

507. No wages may be paid to any workman, as defined in § 506, at or within any public house, beershop, or place for the sale of any spirits, wine, cyder, or other spirituous or fermented liquor, or any office, garden, or place belonging thereto, or occupied therewith, save and except such wages as are paid by the resident owner or occupier of such public house, beershop, or place, to any workman *bonâ fide* employed by him.

Payment of Wages in Public-houses Prohibition Act, 1883, s. 3.
Metalliferous Mines Regulation Act, 1872, s. 9.
Coal Mines Regulation Act, 1887, s. 11 (1).

[The two last named Acts contain the words "or other house of entertainment" after the words "fermented liquor."]

Attachment of wages

508. No order for the attachment of the wages of any servant, labourer, or workman, may be made by any Court.

Wages Attachment Abolition Act, 1870, s. 2.

[This Act supplies no definition of "workman"; but it has been held not to extend to a secretary of a company at £200 a year (*Gordon* v. *Jennings* (1882) 9 Q. B. D. 85).]

Preferential claims for wages

509. In the distribution of the property of a bankrupt, or of a deceased debtor whose estate is being administered by the Court according to the law of bankruptcy, and in the distribution of the assets of any company which is being wound up under the Companies Acts 1862–1900, the following claims

are entitled to rank equally with rates and taxes, and to have priority over all other debts, viz.: —

(*a*) the wages or salary of any clerk or servant, in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order or the commencement of the winding up, not exceeding fifty pounds;

(*b*) all wages of any labourer or workman, whether payable for time or for piece-work, in respect of services rendered to the bankrupt or the company during two months before the date of the receiving order or the winding up, not exceeding twenty-five pounds.

Preferential Payments in Bankruptcy Act, 1888, ss. 1, 3.

["Salary" includes commission of varying amount payable to a commercial traveller (*Re Klein* (1906) xxii T. L. R. 664).]

TITLE V — PRINCIPAL AND AGENT

Definition

510. A contract of agency is a contract whereby the legal relationship of principal and agent (Book I, §§ 121, 123) is created between the parties.

[No form is required except in the cases specified in § 124 (Book I) *supra*. The power of representation created by a contract of agency is termed an "authority." An instrument under seal by which an agent is appointed to represent the principal generally (including the execution of deeds and conduct of legal proceedings) is termed a "letter of attorney" or "power of attorney."]

Voluntary agent

511. A person who undertakes without consideration, otherwise than by specialty, to act as an agent, is not bound to perform his undertaking; but if he acts as agent he incurs the liabilities and acquires the rights of an agent as defined in this Title, so far as they are applicable.

Wilkinson v. *Coverdale* (1793) 1 Esp. 74.
Balfe v. *West* (1853) 13 C. B. 466.

Joint agency

512. An authority conferred on more than one person is, *primâ facie*, a joint authority. When an authority is joint, it cannot, in the absence of expression to the contrary, be exercised except by all

the agents acting together. If it is joint and several, it is exercisable by all and each of the persons authorised.

Brown v. *Andrew* (1849) 18 L. J. Q. B. 153.
Re Liverpool Household Stores (1890) 59 L. J. Ch. 625.

[But not by some of them (Co. Litt. 181 b.) See, however, *Guthrie* v. *Armstrong* (1822) 5 B. & Ald. 628.]

Extent of authority

513. An agent having authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

Bayley v. *Wilkins* (1849) 7 C. B. 886.
Mullens v. *Miller* (1882) 22 Ch. D. 194.

General agent

514. An agent having authority to conduct a particular trade or business, or to act generally for his principal in a particular trade, business, or undertaking, has authority to do every lawful thing necessary or usually incidental thereto.

Young v. *Cole* (1837) 3 Bing. N. C., at p. 732.
Peers v. *Sneyd* (1853) 17 Beav. 151.
Edmunds v. *Bushell* (1865) L. R. 1 Q. B. 97.
Walker v. *G. W. Ry. Co.* (1867) L. R. 2 Ex. 228.
Watteau v. *Fenwick* [1893] 1 Q. B. 346.

General duty of agent

515. It is the duty of the agent to carry out the instructions, express or implied, of his principal,[a] so far as he may lawfully do so.[b] In the absence of

instructions, he must pursue the accustomed course of the business in which he is employed.[c]

(a) *Guerreiro* v. *Peile* (1820) 3 B. & Ald. 616.
Smart v. *Sandars* (1846) 3 C. B. 380.
Butler v. *Knight* (1867) L. R. 2 Ex. 109.
(b) *Bexwell* v. *Christie* (1776) 1 Cowp. 395.
(c) *Comber* v. *Anderson* (1808) 1 Camp. 523.
Foster v. *Pearson* (1834) 1 C. M. & R., at pp. 858–9.

Skill required of agent

516. The agent must exercise a reasonable degree of skill, care, and diligence in the matter or business for which he is employed.

Heys v. *Tindall* (1861) 1 B. & S. 296.
Lee v. *Walker* (1872) L. R. 7 C. P. 121.
Commonwealth Co. v. *Weber* [1905] A. C., at p. 70.

[The standard of skill depends upon what is usual or proper in the matter or business in hand (*Beal* v. *South Devon Ry. Co.* (1864) 3 H. & C. 337). If a person acts as agent gratuitously, he is generally bound only to exercise such skill as he has, unless he has held himself out as competent, in which case he must be reasonably competent (*Shiells* v. *Blackburne* (1789) 1 H. Bl. 158; *Fish* v. *Kelly* (1864) 17 C. B. N. S., at p. 206).]

Agent cannot delegate

517. The agent must act in person unless he has express or implied authority to act by deputy.[a] Such an authority may be implied from the conduct of the parties, or from the usage of a trade or business; and will be implied where it is matter of indifference whether the agent acts personally or by deputy, or where an unforeseen emergency renders necessary the employment of a substitute.[b]

(a) *Combe's Case* (1614) 9 Co. Rep. 77 b.
Schmaling v. *Thomlinson* (1815) 6 Taunt. 147.
De Bussche v. *Alt* (1878) 8 Ch. D. 286.
(b) *Hemming* v. *Hale* (1859) 7 C. B. N. S. 487.
De Bussche v. *Alt ubi sup.*, at p. 310.

Liability for sub-agent

518. The agent is (generally) answerable both to his principal and to third parties, for the acts and defaults of any persons whom he appoints, whether authorised to do so or not, to act for him in the business of the agency ("sub-agent"); and a principal (generally) incurs no liability for the acts and defaults of any person so appointed.

Lockwood v. *Abdy* (1845) 14 Sim. 437.
New Zealand and Australian Land Co. v. *Watson* (1881) 7 Q. B. D. 374.

[If an agent is authorised by a principal to appoint another expressly to be the agent of such principal, and the appointee consents, an immediate relationship of principal and agent may be produced between principal and appointee (*De Bussche* v. *Alt* (1878) 8 Ch. D. 286; *Powell* v. *Jones* [1905] 1 K. B. 11). But such a result is not commonly intended.]

Uberrima fides

519. The agent must act with the strictest good faith towards his principal, and for the principal's exclusive benefit.

Rothschild v. *Brookman* (1831) 2 Dow & Cl. 188.
Pariente v. *Lubbock* (1855) 20 Beav. 588.
Andrew v. *Ramsay* [1903] 2 K. B. 635.

Duty of Disclosure

520. The agent must disclose to his principal all material facts within his knowledge, relating to any transaction into which he enters as agent. In particular, an agent to sell may not himself buy, and an agent to buy may not buy from himself the subject matter of his commission, without full disclosure

of the circumstances. The *onus* of proving that there has been full disclosure is upon the agent.

Dunne v. *English* (1874) L. R. 18 Eq. 524 (agent to sell).
Robinson v. *Mollett* (1875) L. R. 7 H. L. 802 (agent to buy).

Secret profit

521. The agent may not, without the consent of his principal, stipulate for or make any private advantage out of any transaction into which he enters as agent, nor enter as agent into any transaction in which he has an interest adverse to the interest of his principal.[a] If he does so, the principal may (as between himself and the agent) repudiate the transaction within a reasonable time after the circumstances justifying repudiation have become known to him.[b]

(a) *Parker* v. *McKenna* (1874) L. R. 10 Ch. App. 96.
Harrington v. *Victoria Graving Dock* (1878) 3 Q. B. D. 549.
Andrew v. *Ramsay* [1903] 2 K. B. 635.
(b) *Champion* v. *Rigby* (1830) 1 Russ. & M. 539.
Lyddon v. *Moss* (1859) 4 De G. & J. 104.

[The principal may recover from the agent any secret advantage which he may have obtained, and also (but only where the agent has been guilty of fraud) the amount of the commission paid by him to the agent (*Hippisley* v. *Knee* [1905] 1 K. B. 1; *Andrew* v. *Ramsay*, *ubi sup.* See § 527).]

Fiduciary character

522. If an agent who is employed to sell or purchase purchases for himself, without the principal's acquiescence, he holds the purchased property in trust for his principal;[a] but otherwise, in respect of the liability to account, the relation between

agent and principal is that of debtor and creditor, not that of trustee and *cestui que trust*.[b]

(a) *Lees* v. *Nuttall* (1829) 1 Russ. & M. 53 (approved in *Austin* v. *Chambers* (1838) 6 Cl. & F. 1).
Harris v. *Truman* (1882) 9 Q. B. D. 264.
(b) *Lister* v. *Stubbs* (1890) 45 Ch. D. 1; *Powell* v. *Jones* [1905] 1 K. B. 11.

523. The agent may not (generally) dispute the title of his principal to any property which he holds as his agent. *Estoppel by agency*

Dixon v. *Hammond* (1819) 2 B. & Ald. 310.

[For some exceptions to this rule, see *Hardman* v. *Wilcock* (1826) 2 Bing., at p. 382; *Biddle* v. *Bond* (1865) 6 B. & S. 225; *Rogers* v. *Lambert* [1891] 1 Q. B. 318.]

524. The agent must keep the property of his principal separate from his own and from that of other persons,[a] keep and render clear accounts,[b] produce documents for inspection by a proper person when required,[c] and be ready to pay over on demand any balance due to his principal.[d] If he fails in the last respect, he will be chargeable with interest from the date of the refusal to pay.[e] *Special duties of agent*

(a) *Clarke* v. *Tipping* (1846) 9 Beav., at p. 292.
(b) *Gray* v. *Haig* (1854) 20 Beav., at p. 239.
(c) *Dadswell* v. *Jacobs* (1887) 34 Ch. D. 278.
(d) *Harsant* v. *Blaine* (1887) 56 L. J. Q. B., at p. 513.
(e) *Pearse* v. *Green* (1819) 1 Jac. & W. 135.
Harsant v. *Blaine*, *ubi sup.*

Agents' allowances

525. In accounting for money received to the use of his principal, the agent is entitled to deduct all just allowances and disbursements,[a] including disbursements made, with the authority of the principal, for unlawful purposes.[b]

(a) *Dale* v. *Sollet* (1767) 4 Burr. 2133.
(b) *Bayntun* v. *Cattle* (1833) 1 M. & Rob. 265.
Bone v. *Ekless* (1860) 5 H. & N. 925.

[The sums which the agent is entitled to deduct include sums refunded by him to persons who have paid the same to him under mistake of fact (Book I, § 91), or under a contract set aside on the ground of fraud, or otherwise improperly obtained from such persons by the agent. And if, before the agent has actually paid or allowed such sums to his principal, they are reclaimed by the parties entitled, the agent will be personally liable to such third parties in respect thereof. *Buller* v. *Harrison* (1777) 2 Cowp. 565 (mistake); *Owen & Co.* v. *Cronk* [1895] 1 Q. B. 265 (duress); *Murray* v. *Mann* (1848) 2 Exch. 538 (fraud); *Ex parte Edwards* (1884) 13 Q. B. D. 747 (improper payment in bankruptcy).]

Secrets of principal

526. The agent may not make use, against the interest of his principal, of any materials or information obtained by him in the course of his employment and on behalf of his principal.

Lamb v. *Evans* [1893] 1 Ch. 218.

Profits by agent

527. In the absence of express or implied agreement to the contrary, the principal is entitled to all profits and advantages accruing to the agent in the course of his employment beyond the agent's ordinary remuneration,[a] including any secret commis-

sion or bribe,[b] and also including every profit made from the principal's own property.[c]

(a) *Diplock* v. *Blackburn* (1811) 3 Camp. 43.
Morison v. *Thompson* (1874) L. R. 9 Q. B. 480.
(b) *Mayor of Salford* v. *Lever* [1891] 1 Q. B. 168.
Andrew v. *Ramsay* [1903] 2 K. B. 635.
Hippisley v. *Knee* [1905] 1 K. B. 1.
(c) *Docker* v. *Somes* (1834) 2 My. & K. 655.
Shallcross v. *Oldham* (1862) 2 J. & H. 609.

Liability of third parties

528. The agent who accepts a bribe to depart from his duty as agent, and the person who gives it, are jointly and severally liable to the principal for any loss sustained by him in consequence of the fraud. In estimating the amount of damages recoverable under this §, anything which may have been or may be recovered from the agent under § 527 is not taken into account.

Mayor of Salford v. *Lever* [1891] 1 Q. B. 168.

Agent in sole employ

529. If the principal has stipulated for the agent's whole time and labour, he is entitled to all profits made by the agent in employing his time and labour, even outside the course of his employment.

Thompson v. *Havelock* (1808) 1 Camp. 527.

Del credere agent

530. Where an agent for sale has authority to sell on credit, he is not answerable for the solvency

of a purchaser, unless he has expressly undertaken to be so (*del credere* agent).

[The appointment of an agent with a *del credere* commission is not a contract of guarantee within s. 4 of the Statute of Frauds (*Couturier* v. *Hastie* (1852) 8 Exch. 40).]

Agent's commission

531. The agent is entitled to receive from his principal the commission for his services fixed by the contract or by usage, or, where none is fixed, to receive a reasonable remuneration for his services, if such was the intention of the parties.

Read v. *Rann* (1830) 10 B. & C. 438.
Broad v. *Thomas* (1830) 7 Bing. 99.

Forfeiture of commission

532. The agent forfeits his right to his commission by wilful breach of duty or misconduct in the business or matter entrusted to him, as well as by negligence, whereby the principal loses the benefit of the transaction.[a] If, in any case of wilful breach of duty or misconduct, the commission has been paid to or retained by the agent, the principal may recover it from him, even though he otherwise adopts the transaction in respect of which the commission was given or retained.[b]

(a) *White* v. *Lady Lincoln* (1803) 8 Ves., at p. 371.
Hurst v. *Holding* (1810) 3 Taunt. 32.
(b) *Salomans* v. *Pender* (1865) 3 H. & C. 639.
Andrew v. *Ramsay* [1903] 2 K. B. 635.
But see *Hippisley* v. *Knee* [1905] 1 K. B. 1.

Commission due

533. In the absence of special agreement, the agent is entitled (except in the cases provided for in § 532)

to his commission so soon as he has substantially and properly done all that he undertook to do, even though the principal has derived no benefit from his services,[a] or the transaction falls through owing to causes for which the agent is not responsible.[b]

(a) *Horford* v. *Wilson* (1807) 1 Taunt. 12.
Lockwood v. *Levick* (1860) 8 C. B. N. S. 603.
(b) *Webb* v. *Rhodes* (1837) 3 Bing. N. C. 732.
Hill v. *Kitching* (1846) 3 C. B. 299.

Agent's indemnity

534. The agent is entitled to be indemnified by his principal in respect of all expenses, losses, or liabilities, actual or contingent, lawfully and properly incurred by him in the course of his employment.

Lacey v. *Hill, Crowley's Claim* (1870) L. R. 18 Eq. 182.
Thacker v. *Hardy* (1878) 4 Q. B. D. 685.
Read v. *Anderson* (1884) 13 Q. B. D. 779.

Indemnity for wrongful acts

535. The agent is entitled to be indemnified by his principal from liability for any unlawful act done at the instance of his principal, if the act was not obviously unlawful, and the agent acted innocently, and was induced by the conduct of the principal to believe the act to be lawful.

Adamson v. *Jarvis* (1827) 4 Bing. 66.
Betts v. *Gibbins* (1834) 2 A. & E. 57.

Agent's lien

536. The agent has a lien on any movable property in his possession belonging to his principal, in

respect of expenses incurred or commission earned by him in relation to such property.[a] By agreement or by custom the lien may extend to claims in respect of a general balance due from the principal to the agent, or to claims not relating to the property over which the lien is exercised.[b]

(a) *Hammonds* v. *Barclay* (1801) 2 East, 227.
Houghton v. *Matthews* (1803) 3 B. & P., at p. 494.
(b) *Bock* v. *Gorrissen* (1861) 2 De G. F. & J. 434.

[Custom allows a general lien to factors, brokers, solicitors, bankers, wharfingers, and to some other agents.]

Termination of agency

537. Subject to the provisions of §§ 541–546, a contract of agency may be determined in any of the ways specified in § 332 (Book II, Part I).

Death or insanity of parties

538. Except as provided in §§ 545, 546, a contract of agency is determined by the death or insanity of either principal or agent, even though unknown to the other party.

Blades v. *Free* (1829) 9 B & C. 167.
Pool v. *Pool* (1889) 58 L. J. P. 67. (death)
Drew v. *Nunn* (1879) 4 Q. B. D., at p. 665 (insanity).

[For the position of third persons dealing with an agent whose authority has been determined under this §, see Book I, § 141.]

Bankruptcy

539. A contract of agency is *primâ facie* determined by the bankruptcy of the principal.[a] Whether the contract is or is not determined by

the bankruptcy of the agent, depends upon the terms and nature of the contract.[b]

(a) *Goldschmidt* v. *Lyon* (1812) 4 Taunt. 534.
Markwick v. *Hardingham* (1880) 15 Ch. D. 339.
(b) *Phelps* v. *Lyle* (1839) 10 A. & E. 113.

[In *Dixon* v. *Ewart* (1817) 3 Mer. 322, it was held that the bankruptcy of the principal did not revoke an agent's authority to do a merely formal act in completion of a transaction already legally binding, the act being one which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy.]

Relation back

540. When the principal has been adjudged bankrupt, the authority of the agent is deemed to have been revoked as from the date of the first act of bankruptcy committed by the principal within the three months next preceding the date of the presentation of the bankruptcy petition upon which the principal is afterwards adjudicated bankrupt. But this rule does not apply so as to affect prejudicially transactions between the agent and third persons, who have dealt with the agent in good faith and for valuable consideration before the date of the receiving order, and without notice of any available act of bankruptcy, nor so as to prejudice the agent, when there are mutual dealings between him and his principal, in respect of any rights acquired by him before the date of the receiving order and without notice of an available act of bankruptcy.

Ex p. Snowball (1872) L. R. 7 Ch. App. 534.
Elliott v. *Turquand* (1881) L. R. 7 App. Ca. 79.
Palmer v. *Day* [1895] 2 Q. B. 618.
Bankruptcy Act, 1883, s. 49; *ib.* s. 38.

Revocation of authority

541. Except as hereinafter provided (§§ 542–546), the authority of the agent may (as between the parties) be determined by revocation on the part of the principal, at any time before the authority has been completely exercised.[a] But if such revocation is inconsistent with the contract of agency, the agent is entitled to damages for breach of contract.[b]

(a) *Campanari* v. *Woodburn* (1854) 15 C. B., at p. 407, per Jervis, C. J.
Read v. *Anderson* (1882) 10 Q. B. D., at p. 107.
Frith v. *Frith* [1906] A. C. 254.
(b) *Mutzenbecher* v. *La Aseguradora* [1906] 1 K. B. 254.

[No form of revocation is necessary. A power of attorney is revocable, no less than any other authority, by mere word of mouth (*Bromley* v. *Holland* (1802) 7 Ves. 28).]

Authority coupled with interest

542. When by deed or for valuable consideration an authority has been conferred upon an agent for the purpose of thereby securing to him some benefit, the authority so given is irrevocable ("authority coupled with an interest").

Gaussen v. *Morton* (1830) 10 B. & C. 731.
Smart v. *Sandars* (1848) 5 C. B., at p. 917.
Carmichael's Case [1896] 2 Ch. 643.

[*Quære*, whether such an authority is revoked by the death or insanity of the principal (*Smart* v. *Sandars*, *ubi sup.*). As to what is an authority coupled with an interest, see *Frith* v. *Frith*, *ubi sup.*]

Authority acted on

543. When the principal authorises the agent to do a lawful act, the doing of which may, in the ordinary course of things, involve the agent in loss or liability to a third party, and the agent, before revo-

cation of his authority, acts upon the authority and incurs the loss or liability, the authority becomes irrevocable.

Read v. *Anderson* (1882) 10 Q. B. D. 100; (1884) 13 Q. B. D. 779.

[This clause follows the language of Hawkins, J., and Bowen, L. J., in the case cited. *Quære*, does it mean anything more than that, if a principal improperly revokes the authority, he is liable to indemnify the agent in such a case?]

Authority partly executed

544. Subject to the provisions of §§ 542, 543, an authority which has been partially executed is revocable as regards future transactions;[a] but the agent is entitled to reimbursement and indemnity in terms of § 534 as regards actual and contingent liabilities in respect of any transactions already properly entered into under the authority.[b]

(a) *Simpson* v. *Lamb* (1856) 17 C. B., at p. 616.
(b) *Warlow* v. *Harrison* (1859) 1 E. & E., at p. 317.

[*Semble*, this rule probably proceeds on the assumption that the principal has implicitly contracted not to revoke the authority unreasonably. The death of the principal is not, in such case, an unreasonable revocation (*Campanari* v. *Woodburn* (1854) 15 C. B. 400).]

Powers of attorney

545. Any person making any payment or doing any act in good faith in pursuance of a power of attorney is not liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of

mind, bankruptcy, or revocation, was not, at the time of the payment or act, known to the person making or doing the same. (See Book I, § 141 (*b*)). But this rule does not affect any right against the payee of any person interested in any money so paid; and that person has the like remedy against the payee that he would have had against the payer if the payment had not been made by him.

Conveyancing Act, 1881, s. 47; Trustee Act, 1893, s. 23.

Powers expressly made irrevocable

546. If a power of attorney given for valuable consideration is, in the instrument creating the power, expressed to be irrevocable, or if a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser: —

(i) the power cannot in the first case be revoked at any time, nor, in the second case, be revoked during that fixed time either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power;

(ii) any act done as aforesaid by the donee of the power, in pursuance of the power, will be as valid as if anything done by the

donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened;

(iii) neither the donee of the power nor the purchaser will at any time be prejudicially affected by notice of anything done as aforesaid by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, or unsoundness of mind, or bankruptcy of the donor of the power.

This § applies only to powers of attorney created by instruments executed after December 31st, 1882.

Conveyancing Act, 1882, ss. 8 & 9.

Third parties

547. Save as hereinbefore mentioned, the rights and liabilities of the principal and the agent against or to third parties, arising out of the conduct of the agent, are governed by the rules set out in Book I (§§ 126–147).

SECTION VI

INNKEEPER AND GUEST

Definition

548. A common inn is a house the master of which holds himself out as willing to provide board and lodging for travellers generally.

Calye's Case (1584) 8 Co. Rep. 32.
Holder v. *Soulby* (1860) 8 C. B. N. S. 254.
Orchard v. *Bush & Co.* [1898] 2 Q. B. 284.

Liability to receive

549. The keeper of a common inn must receive into his inn any traveller, and the baggage and equipage of any traveller, who offers himself as guest, and supply him with board and lodging at reasonable prices,[a] provided that there is room in the inn,[b] and that the traveller pays, or is able and willing to pay, for his entertainment, and that there is no reasonable ground for refusing to receive him.[c] An innkeeper may demand payment in advance.[d]

(a) *Lamond* v. *Richard* [1897] 1 Q. B. 541.
(b) *Browne* v. *Brandt* [1902] 1 K. B. 696.
(c) *The Queen* v. *Rymer* (1877) 2 Q. B. D. 136.
(d) *Pinchon's Case* (1611) 9 Co. Rep. 87 b.

Safety of guest's belongings

550. In the absence of any express agreement limiting his liability, and subject to the provisions of §§ 551–554, the keeper of a common inn is an-

swerable for the safety of goods and money brought in the ordinary course to his inn by a guest as part of his baggage or equipage.

Calye's Case (1584) 8 Co. Rep. 32.
Kent v. *Shuckard* (1831) 2 B. & Ad. 803 (money).
Cashill v. *Wright* (1856) 6 E. & B. 891.
Robins & Co. v. *Gray* [1895] 2 Q. B. 501.

[A guest is a person who uses an inn for any ordinary convenience of a traveller, whether this includes lodging or not (*Bennett* v. *Mellor* (1793) 5 T. R. 273; *Orchard* v. *Bush & Co.* [1898] 2 Q. B. 284). A person who hires rooms of an innkeeper, but as a lodger merely, is not a guest (*Lamond* v. *Richard* [1897] 1 Q. B. 451); nor is a person who hires a room for a specific purpose, not being an ordinary incident of travel, *e.g.* as a show-room to exhibit his wares (*Burgess* v. *Clements* (1815) 4 M. & S. 306). A person who comes to an inn as a guest cannot remain on indefinitely in that character. Whether he has ceased to be a guest and become a lodger, seems to be a question of fact, not of law (*Lamond* v. *Richard* (*ubi sup.*)).]

Excuses of innkeeper

551. The innkeeper is not answerable for loss or injury to the goods of his guest caused by the act or negligence of the guest himself, or of those for whom he is responsible, by the act of God or by the King's enemies [? or arising from inherent defects in the goods].

Burgess v. *Clements* (1815) 4 M. & S. 306.
Morgan v. *Ravey* (1861) 6 H. & N. 265.
Oppenheim v. *White Lion Hotel Co.* (1871) L. R. 6 C. P. 515.

Limit of liability

552. No innkeeper is liable to make good to any guest any loss of or injury to goods or property

brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than the sum of thirty pounds; unless: —

(1) such goods or property shall have been stolen, lost, or injured through the wilful[a] act, default, or neglect of such innkeeper or any servant in his employ; or

(2) such goods or property shall have been deposited expressly for safe custody with such innkeeper. In the case of such deposit the innkeeper may require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.[b]

(a) "Wilful" applies to "act" only (*Squire* v. *Wheeler* (1867) 16 L. T. 93).

(b) Innkeepers' Liability Act, 1863, s. 1.

Conditions of exemption

553. If the innkeeper refuses to receive any goods or property of his guest for safe custody, or if any guest is through such innkeeper's default unable thus to deposit his goods or property, the innkeeper is not entitled to the benefit of § 552.

Innkeepers' Liability Act, 1863, s. 2.

Copy of section to be exhibited

554. Every innkeeper must cause at least one copy of s. 1 of the Innkeepers' Liability Act, 1863

(§ 552, *supra*), printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn; and he is entitled to the benefit of that Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

Innkeepers' Liability Act, 1863, s. 3.

[The copy exhibited must be substantially accurate (*Spice* v. *Bacon* (1877) 2 Ex. D. 463).]

Innkeeper's lien

555. The innkeeper has a general lien for his charges upon goods brought to his inn by the guest as his goods, whether the property of the guest or not,[a] but not upon the goods of a third person sent to the guest for temporary use, and known by the innkeeper to be so sent.[b]

(a) *Robinson* v. *Walter* (1616) 3 Bulstr. 269.
Mulliner v. *Florence* (1878) 3 Q. B. D. 484.
Gordon v. *Silber* (1890) 25 Q. B. D. 491.
Robins v. *Gray* [1895] 2 Q. B. 501.
(b) *Broadwood* v. *Granara* (1854) 10 Exch. 417.

Security and lien

556. The innkeeper does not, by the mere fact of taking other security from his guest, lose his right of lien.

Angus v. *McLachlan* (1883) 23 Ch. D. 330.

[When goods are detained by an innkeeper in the exercise of his right of lien, he will not be liable for loss of or damage to them unless negligence is proved (*Angus* v. *McLachlan*, *ubi sup.*).]

Enforcement of lien

557. The innkeeper may sell by public auction any goods deposited or left by the guest in respect of which such innkeeper has a right of lien, and pay himself out of the proceeds of such sale the amount of the debt for which the goods could have been retained under the lien, together with the costs and expenses of such sale. But such right is not exercisable unless (a) the goods have been left for six weeks without the debt being paid, and (b) at least one month before such sale the innkeeper has caused to be inserted in one London newspaper and one country newspaper circulating in the district where the goods were deposited or left, an advertisement containing notice of the intended sale, together with a short description of the goods to be sold, and the name of the owner, if known.

The surplus (if any) remaining after such sale must on demand be paid by the innkeeper to the person by whom the goods sold were deposited or left.

Innkeepers Act, 1878, s. 1.

SECTION VII

CARRIAGE

Common carrier

558. A common carrier is a person who holds himself out as willing to carry for reward, without special terms, the goods generally, or any particular kind or kinds of goods, of any person who chooses to employ him.

Coggs v. *Bernard* (1704) 2 Ld. Raym., at p. 918.
Gisbourn v. *Hurst* (1710) 1 Salk. 249.
Liver Alkali Co. v. *Johnson* (1874) L. R. 9 Ex. 338.

[*Quære*, whether a person can be a common carrier who does not ply regularly between fixed *termini* (*Nugent* v. *Smith* (1876) 1 C. P. D., at p. 427; *Liver Alkali Co.* v. *Johnson*, *ubi sup.*). One may be a common carrier to a place outside the realm (*Benett* v. *Peninsular and Oriental Steamboat Co.* (1848) 6 C. B., at p. 786).]

Liability to carry

559. A common carrier is bound to accept and carry the goods of any person who offers to pay his reasonable charge, provided that the goods are such as he professes to carry, and that he has no reasonable excuse for refusing them.

Jackson v. *Rogers* (1684) 2 Show. 327.
Batson v. *Donovan* (1820) 4 B. & Ald. 21.
Garton v. *Bristol & Exeter Ry. Co.* (1861) 1 B. & S., at p. 162.
Dickson v. *G. N. Ry. Co.* (1886) 18 Q. B. D., at p. 183.

[The sum charged by the carrier must be reasonable (*Pickford* v. *Grand Junction Ry. Co.* (1841) 8 M. & W., at pp. 377–378; *G. W. Ry. Co.* v. *Sutton* (1869) L. R. 4 H. L., at p. 237).]

Payment in advance

560. A carrier is entitled to payment of his charge as a condition of receiving the goods into his custody.

Batson v. *Donovan* (1820) 4 B. & Ald., at p. 28.
Pickford v. *Grand Junction Ry. Co., ubi sup.*

Outside radius

561. A common carrier who accepts goods for carriage beyond his professed limits *primâ facie* becomes liable as a common carrier in respect of the whole journey.

Muschamp v. *Lancs. & Preston Junction Ry. Co.* (1841) 8 M. & W. 421.
Wilby v. *West Cornwall Ry. Co.* (1858) 2 H. & N., at pp. 709 ff.

Safe custody

562. A common carrier is bound safely to carry and deliver the goods which he receives in that capacity; and he is answerable as an insurer for all loss of or injury to such goods while in his custody (fair wear and tear excepted),[a] unless such loss or injury is caused by the act of God,[b] or by the King's enemies, or by a defect in the thing carried,[c] or by the negligence of the owner of the goods.[d]

(a) *Stuart* v. *Crawley* (1818) 2 Stark. 323.
(b) *Nugent* v. *Smith* (1876) 1 C. P. D. 423.
(c) *Hudson* v. *Baxendale* (1857) 2 H. & N. 575.
Blower v. *G. W. Ry. Co.* (1872) L. R. 7 C. P. 655.
Lister v. *Lancs. & Yorks. Ry. Co.* [1903] 1 K. B. 878.
(d) *Baldwin* v. *London, Chatham & Dover Ry. Co.* (1882) 9 Q. B. D. 582.

Delay

563. A common carrier is bound to deliver within a reasonable time goods which he has received for

carriage; but he is not answerable for delay in carriage or delivery arising from causes beyond his control.

Taylor v. *G. N. Ry. Co.* (1866) L. R. 1 C. P. 385.

Duration of liability

564. A common carrier remains liable as such for goods entrusted to him, until he has delivered them or tendered delivery of them to or to the order of the consignee.[a] But if the consignee or his assignee fails to accept delivery,[b] or if the carrier retains possession of the goods under a lawful claim of lien, or under a contract express or implied as wharfinger or warehouseman,[c] he ceases to be liable as a common carrier, and becomes liable as depositee, or as lien-holder, or as wharfinger, or warehouseman respectively, in respect of the goods so remaining in his possession.[d]

(a) *Bourne* v. *Gatliffe* (1844) 11 Cl. & F. 45.
McKean v. *McIvor* (1870) L. R. 6 Ex. 36.
Patscheider v. *G. W. Ry. Co.* (1878) 3 Ex. D. 153.
Hodkinson v. *L. & N. W. Ry. Co.* (1884) 14 Q. B. D. 228.
(b) *Heugh* v. *L. & N. W. Ry. Co.* (1870) L. R. 5 Ex. 51.
(c) *Shepherd* v. *Bristol Ry. Co.* (1868) L. R. 3 Ex. 189.
Mitchell v. *Lancs. & Yorks. Ry. Co.* (1875) L. R. 10 Q. B. 256.
(d) *Crouch* v. *G. W. Ry. Co.* (1858) 3 H. & N. 183.
Hudson v. *Baxendale* (1857) 2 H. & N., at p. 581.

[In the absence of any agreement or usage to the contrary, a common carrier is bound to deliver goods at the consignee's address (*Hyde* v. *Trent & Mersey Navigation Co.* (1793) 5 T. R. 389).]

Special contract

565. Subject to the provisions of § 575, a common carrier may limit or vary his liability by special contract [a]; but no public notice or declaration limits or in anywise affects the liability at common law of any common carrier in respect of any goods to be carried by him,[b] unless its terms are incorporated in a special contract of carriage.[c]

(a) *Scaife* v. *Farrant* (1875) L. R. 10 Ex. 358.
Price v. *Union Lighterage Co.* [1904] 1 K. B. 412.
Carriers Act, 1830, s. 6.
(b) *Ib.* s. 4.
(c) *Walker* v. *Yorks. & N. Mid. Ry. Co.* (1853) 2 E. & B. 750.

Valuable goods

566. No common carrier by land for hire is liable for the loss of or injury to any property of the descriptions following, viz. gold or silver coin (British or foreign), gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets, bills, notes of any bank in Great Britain or Ireland, orders, notes or securities for payment of money (English or foreign), stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, plated articles, glass, china, silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials, furs, or lace (other than machine-made lace) [a] contained in any package delivered either to be carried for hire or to accompany the person of any passenger in any public

conveyance, when the value thereof exceeds ten pounds, unless, at the time of delivery for carriage, the value and nature of such property have been declared by the person sending or delivering the same, and the increased charge mentioned in § 567, or a promise to pay the same, has been accepted by the person receiving such package.(b)

(a) Carriers Act Amendment Act, 1865, s. 1.
(b) Carriers Act, 1830, s. 1.

[The wording of s. 1. of the Carriers Act, if strictly followed, would lead to the conclusion, that a carrier might escape responsibility for valuable goods by refusing to accept the insurance payment or engagement. But such a construction would be inconsistent with s. 3 (*post*, § 568).]

Increased charges

567. For the carriage of any package containing any of the goods mentioned in § 566, concerning which such a declaration has been made, and the value whereof exceeds the sum of ten pounds, a common carrier may demand and receive an increased rate of charge. Such increased rate must be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house, where such packages are received for the purpose of conveyance; and all persons sending or delivering such packages to or at such office are bound by such notice, without further proof of it having come to their knowledge.

Carriers Act, 1830, s. 2.

Receipt

568. When the value of such goods has been so declared, and the increased rate of charge has been paid, or a promise to pay the same has been accepted, the person receiving such increased rate of charge, or accepting such promise, must, if required, sign a receipt for the package, acknowledging the same to have been insured (which receipt is not liable to any stamp duty); and if such receipt is not given when required, or such notice has not been affixed, the common carrier is not entitled to any benefit under §§ 566, 567, but is responsible as at the common law, and liable to refund the increased rate of charge.

Carriers Act, 1830, s. 3.

[The construction which has been put upon the somewhat ambiguous contents of ss. 1–3 of the Carriers Act is: that the consignor can in no case claim in respect of a package coming within § 566, unless he has made the declaration therein described (*Hart* v. *Baxendale* (1851) 6 Exch. 769). On the other hand, the declaration having been made, the carrier can claim no exemption on the ground that no increased charge was paid, if in fact no such charge was demanded (*G. N. R. Co.* v. *Behrens* (1862) 7 H. & N. 950).]

Recovery of special charge

569. When a package has been delivered at the office of the common carrier, and the value and contents thereof declared and the increased rate of charges paid in accordance with § 567, and such parcel has been lost or damaged, the party entitled to recover damages in respect of such loss or damage

is also entitled to recover back the increased charges so paid.

Carriers Act, 1830, s. 7.

[*Quære*, does this rule apply in the case of a package collected *en route?*]

No protection against felonious loss

570. The provisions of § 566 do not protect a common carrier from liability to answer for loss or injury to goods arising from the felonious acts of any servant in his employ,[a] unless liability for such acts has been excluded by special contract.[b]

(a) Carriers Act, 1830, s. 8.
(b) *Shaw* v. *G. W. Ry. Co.* [1894] 1 Q. B. 373.

Proof of value

571. The burden of proving the value of any parcel entrusted to a common carrier, for the purposes of § 566, falls upon the party suing in respect of any loss or injury. The carrier is not concluded as to the value of such parcel by the value declared; but the party suing cannot recover more than the declared value, together with the increased charge paid by him (if any).

Carriers Act, 1830, s. 9.

Railway companies

572. Railway companies are not common carriers, except as to the goods they profess to carry as such.[a] But every railway company, canal

company, and railway and canal company, must, according to its respective powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic, upon and from the several railways and canals belonging to or worked by it. (b)

(a) *Palmer* v. *Grand Junction Ry. Co.* (1839) 4 M. & W. 749.
Johnson v. *Midland Ry. Co.* (1849) 4 Exch. 367.
M'Manus v. *Lancs. & Yorks. Ry. Co.* (1859) 4 H. & N. 327.
Dickson v. *G. N. Ry. Co.* (1886) 18 Q. B. D., at pp. 184–185.
(b) Railway and Canal Traffic Act, 1854, s. 2.

["Traffic" here includes not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description, adapted for running or passing on the railway or canal of any such company (Railway and Canal Traffic Act, 1854, s. 1).]

Luggage in carriage

573. When a railway company professes to act as common carrier of the personal luggage of passengers, its liability as such extends to personal luggage carried or accepted to be carried along with the passenger in the carriage by which he travels or intends to travel.

G. W. Ry. Co. v. *Bunch* (1888) L. R. 13 App. Ca., at p. 42.

Special contract

574. Railway companies, canal companies, and railway and canal companies, cannot limit their liability (whether as common carriers or otherwise)(a)

for the loss of or for any injury done to any animals or goods in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, by any notice, condition, or declaration, or by any special contract, unless the conditions therein contained with respect to the receiving, forwarding, and delivering of such goods or animals are adjudged by the Court to be just and reasonable, and unless the special contract is signed by the other contracting party, or by the person delivering such animals or goods for carriage.(b)

(a) *Dickson* v. *G. N. Ry. Co.* (1886) 18 Q. B. D. 176.
(b) Railway and Canal Traffic Act, 1854, s. 7.

[The burden of proving a condition to be just and reasonable falls on the company. *Dickson* v. *G. N. Ry. Co.*, *ubi sup.*, at p. 181 (per Lord Esher, M. R.). The provisions of this § do not apply to a limitation of liability for loss occasioned otherwise than by the neglect or default of the company or its servants; *e. g.* they do not apply to loss by the felonious acts of the company's servants (*Shaw* v. *G. W. Ry. Co.* [1894] 1 Q. B. 373) or by accident (*Harrison* v. *L. B. & S. C. Ry. Co.* (1862) 31 L. J. Q. B., at p. 114).]

Live animals

575. No greater damages may be recovered from any such company for the loss of or for any injury done to any animals of the following classes beyond the sums following: viz. for any horse, fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds — unless the person sending or delivering the same to such company has, at the time of such delivery, declared

them to be respectively of higher value than as above mentioned, in which case the company may demand and receive by way of compensation, for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums above mentioned. Such excess must be paid in addition to the ordinary rate of charge, and must be notified in the manner prescribed in § 567.

Railway and Canal Traffic Act, 1854, s. 7.

[The proof of the value of such animals or goods, and of the amount of the injury done thereto, lies in all cases upon the person claiming compensation for such loss or injury (*Ibid.*).]

Liability as common carrier

576. The provisions of §§ 574, 575 do not affect the rights, privileges, or liabilities of any such company as common carrier under the Carriers Act, 1830 (§§ 566–571), with respect to articles of the descriptions therein mentioned.

Railway and Canal Traffic Act, 1854, s. 7.

Carriage of passengers

577. A person who undertakes to carry passengers for hire is bound to furnish a vehicle for the carriage of such passengers as fit for the purpose as care and skill can render it, and to exercise reasonable care and skill in carrying them; but he does not, in the absence of express agreement, warrant the safety of the vehicle, or the security of the passengers. [a]

The same principle applies to the carriage of goods by a person who does not carry them in the capacity of a common carrier.(b)

(a) *Redhead* v. *Mid. Ry. Co.* (1869) L. R. 4 Q. B. 379.
(b) *Simson* v. *London General Omnibus Co.* (1873) L. R. 8 C. P. 390. *East Indian Rail. Co.* v. *Kalides Mukerjee* [1901] A. C. 396.

Gratuitous carriage

578. A person who undertakes to carry passengers or goods gratuitously is liable for damage to them caused by the absence of reasonable care on the part of himself or his servants.

Coggs v. *Bernard* (1705) 2 Ld. Raym. 909.
Beauchamp v. *Pouley* (1831) 1 Moo. & Rob., at p. 40.
Moffat v. *Bateman* (1869) L. R. 3 P. C. 115.
Harris v. *Perry* [1903] 2 K. B. 219.

Dangerous goods

579. A person who delivers to another for carriage goods which the carrier does not know to be of a dangerous character, is bound, if the dangerous character of the goods is not apparent, to make it known to the person to whom they are delivered for carriage. If he fails to do so, he is answerable for any damages resulting from such non-disclosure.

Brass v. *Maitland* (1856) 6 E. & B. 470.
Farrant v. *Barnes* (1862) 11 C. B. N. S. 553.

Effect of non-disclosure

580. Except as provided by § 566, the owner of the goods is not precluded from pursuing his reme-

dies under the contract by reason of non-disclosure of the character of the goods to the carrier.

Riley v. *Horne* (1828) Bing. 217.
Crouch v. *L. & N. W. Ry. Co.* (1854) 14 C. B. 255.
Shaw v. *G. W. Ry. Co.* [1894] 1 Q. B. 373.

Carrier's lien

581. A carrier, whether he is or is not a common carrier, has a lien upon any goods delivered to him for carriage for his charges in respect of such goods, and may retain such goods under his lien at the end of his journey, as against both the consignor and the consignee.(a) By agreement with the consignor or consignee, or by usage, he may also have a lien upon such goods in respect of a general balance due to him for carriage.(b) But the fact that he has a lien for a general balance against either of these parties does not of itself entitle him to retain the goods against the other.(c)

(a) *Oppenheim* v. *Russell* (1802) 3 B. & P. 42.
Skinner v. *Upshaw* (1702) 2 Ld. Raym. 752.
(b) *Aspinall* v. *Pickford* (1800) 3 B. & P. 44 n. (a)
Rushforth v. *Hadfield* (1806) 7 East, at pp. 229–230.
(c) *Butler* v. *Woolcott* (1805) 2 B. & P. N. R. 64.
Oppenheim v. *Russell* (1802) 3 B. & P. 42.
Wright v. *Snell* (1822) 5 B. & Ald. 350.

Carriage by water

582. Any person who, as owner of a ship or other vessel, exercises the calling of a carrier of goods for hire, whether by means of inland navigation, coastwise, or abroad, incurs, in the absence of agreement

to the contrary, the liability of a common carrier, with respect to goods received by him for carriage.

Liver Alkali Co. v. *Johnson* (1874) L. R. 9 Ex. 338.
Hill v. *Scott* [1895] 2 Q. B. 371 ; 713 (C. A.)

[But (*semble*) he is not bound to receive and carry.]

Carriage by sea

583. The provisions of this Section, except §§ 566–569, apply both to carriage by land and to carriage by sea, but to carriage by sea only so far as they are not inconsistent with the rules of the Law Merchant and Admiralty Law.

SECTION VIII

PARTNERSHIP

Definition

584. Partnership is the relation which subsists between persons carrying on a business in common with a view of profit. The expression "business" includes every trade, occupation, or profession.

Partnership Act, 1890, ss. 1, (1), 45.

"Firm"

585. Persons who have entered into partnership with one another are in this Section called collectively a "firm"; and the name under which their business is carried on is called the "firm-name."

Partnership Act, 1890, s. 4. (1).

Existence of partnership

586. In determining whether a partnership does or does not exist, regard must be had to the whole facts of the case and the expressed intention of the parties.

Cox v. *Hickman* (1860) 8 H. L. C. 286.

Companies

587. The relation between members of any company or association which is —

(*a*) registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or

(*b*) formed or incorporated by or in pursuance of any other Act of Parliament or Letters Patent, or Royal Charter; or

(*c*) a company engaged in working mines within and subject to the jurisdiction of the Stannaries —

is not a partnership within the meaning of this Section.

Partnership Act, 1890, s. 1 (2).

Co-ownership

588. Joint tenancy, tenancy in common, joint property, common property, or part ownership, does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

Partnership Act, 1890, s. 2 (1).

Sharing of gross returns

589. The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived.

Partnership Act, 1890, s. 2. (2).

Sharing of profits

590. The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business; but the receipt of such a share, or of a payment contingent on, or varying with, the profits of a business, does not of itself make him a partner in the business.

Partnership Act, 1890, s. 2 (3).

Payment of debt out of profits

591. The receipt by a person of a debt or other liquidated amount by instalments, or otherwise, out of the accruing profits of a business, does not of itself make him a partner in the business, or liable as such.

Partnership Act, 1890, s. 2 (3) (a).

Remuneration according to profits

592. A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business, does not of itself make the servant or agent a partner in the business, or liable as such.

Partnership Act, 1890, s. 2 (3) (b).

Widow or child of deceased partner

593. A person, being the widow or child of a deceased partner, receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business, or liable as such.

Partnership Act, 1890, s. 2 (3) (c).

Lender of capital

594. The advance of money by way of loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such, provided that the contract is in writing and signed by or on behalf of all the parties thereto.

Partnership Act, 1890, s. 2 (3) (d).

Vendor paid out of profits

595. A person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business, is not, by reason only of such receipt, a partner in the business, or liable as such.

Partnership Act, 1890, s. 2 (3) (e).

Postponement of lender and vendor to ordinary creditors

596. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in § 594, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan is not entitled

to recover anything in respect of his loan, and the seller of the goodwill is not entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

Partnership Act, 1890, s. 3.

Number of partners

597. No partnership consisting of more than ten persons may be formed for the purpose of carrying on the business of banking, unless it is registered as a company under the Companies Act, 1862, or is formed in pursuance of some other Act of Parliament, or of Letters Patent; and no partnership consisting of more than twenty persons may be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the partnership, or by the individual members thereof, unless it is registered as a company under the Companies Act, 1862, or is formed in pursuance of some other Act of Parliament or of Letters Patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

Companies Act, 1862, s. 4.
Sykes v. *Beadon* (1879) 11 Ch. D. 170.
Shaw v. *Benson* (1883) 11 Q. B. D. 563.

[The Court of the Vice-Warden of the Stannaries has ceased to exist; but its jurisdiction still survives, and is exercisable by certain County Courts (Stannaries Court (Abolition) Act, 1896).]

Infants in partnership

598. Any person capable of contracting may become a partner. A minor avoiding a contract of partnership in terms of Book I, §§ 52, 53, may recover back any money paid by him in pursuance of such contract, if he has derived no advantage under the contract;[a] but, so long as he remains a partner, any property brought by him into the partnership is, as between himself and his co-partners, applicable in discharge of the liabilities of the firm.[b]

(a) *Corpe* v. *Overton* (1833) 10 Bing. 252.
Hamilton v. *Vaughan Sherrin Electrical Co.* [1894] 3 Ch. 589.
(b) *Lovell* v. *Beauchamp* [1894] A. C., at p. 611.

Statute of Frauds

599. A contract for a partnership which is to commence more than a year from the date of the contract, or is to continue in existence for more than a year, falls within § 4 of the Statute of Frauds (Book I, Part I, § 220).[a] But the fact that a partnership is formed in relation to or for the acquisition of land does not bring it within the statute.[b]

(a) *Williams* v. *Jones* (1826) 5 B. & L. 108.
Forster v. *Hale* (1800) 5 Ves. 308.
Dale v. *Hamilton* (1846) 5 Ha. 369.
(b) *Essex* v. *Essex* (1855) 20 Beav. 449.

[An agreement to retire from a firm, the property of which consists partly of interests in land, is probably within the statute, if it contemplates the assignment of the partnership assets. (*Gray* v. *Smith* (1889) 43 Ch. D. 208.)]

Authority of partners

600. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Partnership Act, 1890, s. 5.

Business of the firm

601. Whether an act is or is not done for carrying on in the usual way business of the kind carried on by the firm, depends upon the nature of the business and the practice of persons engaged in it.

Mara v. *Browne* [1896] 1 Ch. 199.
Lindley, *Partnership* (7th ed.) p. 148.

Exercise of authority

602. An act or instrument relating to the business of the firm, and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is (if otherwise regular) binding on the firm and all the partners.

Partnership Act, 1890, s. 6.

603. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this rule does not affect any personal liability incurred by an individual partner. *Partner acting outside the business*

Partnership Act, 1890, s. 7.

604. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement. *Partner acting in defiance of agreement*

Partnership Act, 1890, s. 8.

605. Every partner in a firm is liable, jointly with the other partners, for all debts and obligations of the firm incurred while he is a partner; and, after his death, his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts. *Liability of partner for debts of firm*

Partnership Act, 1890, s. 9.

[Nothing which occurs after the death of the partner can increase the liabilities of his estate. *E.g.*, if goods are ordered before, but not delivered till after the death, an action for goods sold and delivered will not lie against the representatives of the deceased partner (*Bagel* v. *Miller* [1903] 2 K. B. 212).]

Liability of firm for torts of partner

606. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Partnership Act, 1890, s. 10.

Misapplication of property of third parties by partner

607. In the following cases; namely —

(*a*) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and

(*b*) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm —

the firm is liable to make good the loss.

Partnership Act, 1890, s. 11.

Liability in tort joint and several

608. Every partner is liable, jointly with his co-partners and also severally, for everything for which the firm, while he is a partner therein, becomes liable under either of the two last preceding §§.

Partnership Act, 1890, s. 12.

[For the consequences of joint liability, see §§ 361–366 (*ante*, Book II, Part I). But there is no right of contribution (§ 365) amongst joint tort-feasors. See *post*, Book II, Part III.]

Breach of trust by partner

609. If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein; except that:

(*a*) this § does not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(*b*) nothing in this § prevents trust money from being followed and recovered from the firm if still in its possession or under its control.

Partnership Act, 1890, s. 13.

[*E. g.*, a partner with whose knowledge trust moneys are employed in the business of the firm remains liable in respect thereof, even after retirement from the firm, and even though he has received a [gratuitous] discharge from the trustees. (*Smith* v. *Patrick* [1901] A. C. 282.)]

Holding out as partner

610. Every one who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. But where, after a partner's death, the partnership business is continued in the

old firm-name, the continued use of that name, or of the deceased partner's name as part thereof, will not of itself make his executors or administrators, estate or effects, liable for any partnership debts contracted after his death.

Partnership Act, 1890, s. 14.

Representation of partner binding on firm

611. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business (other than a representation as to the extent of his own authority to bind the firm), is evidence against the firm.

Partnership Act, 1890, s. 15.

Notice to partner notice to firm

612. Notice to any partner who habitually acts in the partnership business, of any matter relating to partnership affairs, operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Partnership Act, 1890, s. 16.

Liability of incoming partner

613. A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

Partnership Act, 1890, s. 17 (1).

Liability of retiring partner

614. A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

Partnership Act, 1890, s. 17 (2).

Release of retiring partner

615. A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors; and this agreement may be either express, or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Partnership Act, 1890, s. 17 (3).

[But see note to § 609.]

Effect of change of partners on guarantee

616. A continuing guarantee, given either to a firm or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee was given.

Partnership Act, 1890, s. 18.

Variation of partnership terms

617. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Section, may be varied by the consent of all the

partners; and such consent may be either express or inferred from a course of dealing.

Partnership Act, 1890, s. 19.

[Observe that the operation of this § is confined to *mutual* rights and duties. It does not, of course, apply to dealings with third parties.]

Partnership property

618. All property, and rights and interests in property, originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business ("partnership property"), must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.

Partnership Act, 1890, s. 20 (1).

Partnership land

619. The legal estate or interest in any land which belongs to the partnership devolves according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust (so far as necessary *), for the persons beneficially interested in the land under §§ 618, 622.

Partnership Act, 1890, s. 20 (2).

* [The precise meaning of these words is not apparent; but they are in the Act.]

Purchase of other land by co-owners

620. Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land, and purchase other land out of the profits to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners, for the same respective estates and interests as are held by them, at the date of the purchase, in the land first mentioned.

Partnership Act, 1890, s. 20 (3).

Property bought with partnership funds

621. Unless a contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Partnership Act, 1890, s. 21.

[And the mere fact that it has been bought in a fictitious name will not prevent even the legal title vesting in the partners (*Wray* v. *Wray* [1905] 2 Ch. 349).]

Partnership land personal estate

622. Where an interest in land has become partnership property, it is, unless the contrary intention appears, treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate.

Partnership Act, 1890, s. 22.

[The importance of this rule will fully appear in Book V. of this work.]

Execution against partnership property for debts of partner

623. A writ of execution will not issue against any partnership property, except on a judgment against the firm. But the Court may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may, by the same or a subsequent order, appoint a receiver of that partner's share of profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

Partnership Act, 1890, s. 23 (1) (2).

Redemption by other partners

624. In the case of such a charge as is described in the last §, the other partner or partners is or are at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase the same.

Partnership Act, 1890, s. 23 (3).

Rights of partners inter se

625. The interests of partners in the partnership property, and their rights and duties in relation to

the partnership, are determined, subject to any agreement express or implied between the partners, by the following rules: —

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him —

(*a*) in the ordinary and proper conduct of the business of the firm; or,

(*b*) in or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent per annum from the date of the payment or advance.

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5) Every partner may take part in the management of the partnership business.

(6) No partner is entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner without the consent of all existing partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books must be kept at the place of business of the partnership (or the principal place, if there is more than one); and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Partnership Act, 1890, s. 24.

Expulsion of partner

626. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Partnership Act, 1890, s. 25.

Determination of partnership

627. Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time, on giving notice of his intention so to do to all the other partners. Even where the partnership has originally been constituted by deed, a notice in writing,

signed by the partner giving it, is sufficient for this purpose.

Partnership Act, 1890, s. 26.

Prolongation of partnership

628. Where a partnership, entered into for a fixed term, is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will. A continuance of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

Partnership Act, 1890, s. 27.

Accounts and information

629. Partners are bound to render true accounts and full information of all things affecting the partnership, to any partner or his legal representatives.

Partnership Act, 1890, s. 28.

Separate profits of partners

630. Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connexion. This rule applies also to transactions undertaken

after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Partnership Act, 1890, s. 29.

["either by any surviving partner," etc. Presumably these words relate to "undertaken" and not to "wound up."]

Profits of competing business

631. If a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Partnership Act, 1890, s. 30.

Assignee of share not entitled to act as partner

632. An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled; and the assignee must accept the account of profits agreed to by the partners.

Partnership Act, 1890, s. 31 (1).

Account on dissolution

633. In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Partnership Act, 1890, s. 31 (2).

Expiry of partnership

634. Subject to any agreement between the partners, a partnership is dissolved—

(a) if entered into for a fixed term, by the expiration of that term;

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;

(c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last mentioned case, the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Partnership Act, 1890, s. 32.

Dissolution by death or bankruptcy

635. Subject to any agreement between the partners, every partnership is dissolved, as regards all

the partners, by the death or bankruptcy of any partner.

Partnership Act, 1890, s. 33 (1).

Dissolution by charge of share

636. A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under the Partnership Act, 1890, for his separate debt.

Partnership Act, 1890, s. 33 (2).

Dissolution by illegality

637. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on, or for the members of the firm to carry it on in partnership.

Partnership Act, 1890, s. 34.

Dissolution by decree for

638. On application by a partner, the Court may decree a dissolution of the partnership in any of the following cases: —

Lunacy

(a) when a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend as by any other partner;

Incapacity

(b) when a partner, other than the partner suing, becomes in any other way permanently in-

capable of performing his part of the partnership contract;

(c) when a partner, other than the partner suing, has been guilty of such conduct, as, in the opinion of the Court, regard being had to the nature of the business, is calculated to affect prejudicially the carrying on of the business; *Misconduct*

(d) when a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him; *Breach of agreement or incompatibility*

(e) when the business of the partnership can only be carried on at a loss; *Loss on working*

(f) whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved. *Other circumstances*

Partnership Act, 1890, s. 35.

639. Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change. An advertisement in the "London Gazette," by a firm whose principal place of business is in *Retiring partner may continue liable*

England or Wales, is notice to persons who had not dealings with the firm before the date of the dissolution or change so advertised,[a] but not (*semble*) to persons who dealt with the old firm unless they actually knew of it.[b]

(a) Partnership Act, 1890, s. 36 (1) (2).
(b) *Graham* v. *Hope* (1792) 1 Peake, 208.

Exemption from liability

640. The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Partnership Act, 1890, s. 36 (3).

Notice of retirement

641. On the dissolution of a partnership or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Partnership Act, 1890, s. 37.

Winding-up after dissolution

642. After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be

necessary to wind up the affairs of the partnership, and to complete transactions begun at the time of the dissolution, but not otherwise.

Partnership Act, 1890, s. 38.

Liability for bankrupt partner

643. The firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has, after the bankruptcy, represented himself, or knowingly suffered himself to be represented, as a partner of the bankrupt.

Partnership Act, 1890, s. 38.

Distribution of assets on dissolution

644. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

Partnership Act, 1890, s. 39.

Return of premium

645. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term, otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless —

(a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Partnership Act, 1890, s. 40.

Rights of innocent partner on rescission

646. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled —

(a) to a lien on the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership, and for any capital contributed by him;

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities;

(c) to be indemnified by the person guilty of the fraud or making the representation, against all the debts and liabilities of the firm.

Partnership Act, 1890, s. 41.

Interest on capital of outgoing partner

647. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets, without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets.

Partnership Act, 1890, s. 42 (1).

Purchase of outgoing partner's interest

648. Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any part-

ner, assuming to act in exercise of the option, does not in all material respects comply with the terms thereof, he is liable to account under § 647.

Partnership Act, 1890, s. 42 (2).

Purchase money a debt

649. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner, or the representatives of a deceased partner in respect of the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death.

Partnership Act, 1890, s. 43.

Accounts on dissolution

650. In settling accounts between the partners after a dissolution of partnership, the following rules are, subject to any agreement, to be observed: —

(a) Losses, including losses and deficiencies of capital, are paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, are applied in the following manner and order: —

1. In paying the debts and liabilities of the firm to persons who are not partners therein;

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
3. In paying to each partner rateably what is due from the firm to him in respect of capital;
4. The ultimate residue, if any, is divided among the partners, in the proportion in which profits are divisible.

Partnership Act, 1890, s. 44.

Sale of goodwill

651. The sale of the goodwill of a partnership business, either to one or more of the partners or to a third party, does not (in the absence of special agreement) prevent the vendor carrying on a similar business in competition with the purchaser or purchasers.[a] But the vendor may not (in the absence of special agreement) solicit the customers of the old business, though he may do business with them if they resort to him without solicitation.[b]

(a) *Charton* v. *Douglas* (1859) Johns. 174.
Trego v. *Hunt* [1896] A. C. 7.
(b) *Gillingham* v. *Beddow* [1900] 1 Ch. 685.
Curl Bros. v. *Webster* [1904] 1 Ch. 685.

SECTION IX

GUARANTEE

Definition

652. A contract of guarantee is a contract whereby one person ("the surety") promises another person ("the creditor") to be answerable in the event of a third person ("the principal debtor") making default in respect of a liability incurred or to be incurred by such third person to the promisee.

Hargreaves v. *Parsons* (1844) 13 M. & W., at p. 570.
In re Hoyle [1893] 1 Ch., at p. 99.

Must be a principal debtor

653. It is essential to the contract of guarantee that there should be a primary and continuing liability of a principal debtor;[a] but the primary liability contemplated by the contract may be future or contingent.[b]

(a) *Birkmyr* v. *Darnell* (1705) 1 Salk. 27.
Goodman v. *Chase* (1818) 1 B. & Ald. 297.
Lakeman v. *Mountstephen* (1874) L. R. 7 H. L., at p. 24.
(b) *Russell* v. *Moseley* (1822) 3 Brod. & B. 211.
Mallet v. *Bateman* (1865) L. R. 1 C. P. 163.

[A contract of guarantee must be distinguished from a contract of indemnity, which is a contract to save another harmless, independently of the question whether a third person makes default or not (*Guild* v. *Conrad* [1894] 2 Q. B., at p. 896). It is often hard to tell in a given case whether an indemnity or a guarantee

is intended. In the former event, the liability of the promisor is primary and independent; in the second, it is merely subsidiary and collateral, attaching only in the event of the default of the principal debtor. A contract may appear to be a guarantee and yet be an indemnity, as where a person purports to guarantee an infant's debt for goods, not being necessaries. Since the infant incurs no primary liability, the other party renders himself liable, not as surety but as principal (*Harris* v. *Huntback* (1757) 1 Burr. 373, per Foster, J.).]

Statute of Frauds

654. When the sole object of a contract of guarantee is to answer for the debt, default, or miscarriage of another, the contract must (subject to § 655) comply with the requirements of § 220, Book II, Part I; but when it is merely incidental to a transaction having another object in view, the provisions of § 220 do not apply.

Harburg India Rubber Co. v. *Martin* [1902] 1 K. B. 778.

[For instances of guarantees not falling within the Statute of Frauds (§ 220 *supra*) see the remarks of Vaughan Williams, L. J., in the case last cited, at p. 786.]

Consideration

655. A contract of guarantee (not being a specialty) requires a consideration;[(a)] but it is not necessary that the consideration should be expressed in writing.[(b)]

(a) *French* v. *French* (1841) 2 M. & G. 644.
(b) Mercantile Law Amendment Act, 1856, s. 3.

Single and continuing guarantees

656. A contract of guarantee may apply either to a single transaction, or to all transactions of the

kind specified, and, in the latter case, either for a given time or indefinitely ("continuing guarantee"). Whether a guarantee is single or continuing is a question of construction, depending in each case upon the terms of the contract and the circumstances in which it was made.

Heffield v. *Meadows* (1869) L. R. 4 C. P. 595.
Morrell v. *Cowan* (1877) 7 Ch. D. 151.
Lloyd's v. *Harper* (1880) 16 Ch. D., at p. 303.
And see *Merle* v. *Wells* (1810) 2 Camp. 413.

Uberrima fides

657. The surety is entitled to be truly informed of the real nature of the transaction between the creditor and the principal debtor, in respect of which he promises to be liable. If by the creditor, or with his knowledge, any material part of the transaction is misrepresented to, or fraudulently concealed from, the surety, before or at the time of his promise, the guarantee is void.

Pidcock v. *Bishop* (1825) 3 B. & C. 605.
Railton v. *Mathews* (1844) 10 Cl. & F. 934.
Hamilton v. *Watson* (1845) 12 Cl. & F. 109.
Lee v. *Jones* (1863) 14 C. B. N. S. 386; 17 C. B. N. S. 482.

Subsequent dealings

658. In the case of a continuing guarantee, if any such misrepresentation or concealment takes place after the making of the contract of guarantee, the guarantee thereupon becomes void.

Phillips v. *Foxall* (1872) L. R. 7 Q. B. 666.
Sanderson v. *Aston* (1873) L. R. 8 Ex. 73.

659. Except as provided by the last two §§, no general duty of disclosure is cast upon the creditor. *Disclosure*

North British Insurance Co. v. *Lloyd* (1854) 10 Exch. 523.
Lee v. *Jones* (1863) 14 C. B. N. S. 386; 17 C. B. N. S. 482.
Hamilton v. *Watson* (1845) 12 Cl. & F. 109.
Davies v. *London Marine Insurance Co.* (1878) 8 Ch. D., at p. 475.

660. A continuing guarantee may, in the absence of express or implied agreement to the contrary, be revoked at any time as regards future transactions, by notice to the creditor; unless the consideration moving from the creditor has been wholly performed before the notice is given. *Revocation of guarantee*

Offord v. *Davies* (1862) 12 C. B. N. S. 748.
Lloyd's v. *Harper* (1880) 16 Ch. D. 290.
In re Crace [1902] 1 Ch. 733.

[At common law a specialty guarantee was irrevocable; but, *semble*, this rule no longer exists (per Joyce, J., *In re Crace*, at p. 738).]

661. The extent of the surety's liability is determined by the contract of guarantee. It may be less, but cannot be more than that of the principal debtor. *Liability of surety*

Ex parte Young (1881) 17 Ch. D., at p. 671.

662. When the surety gives a guarantee limited in amount, it is a question of construction whether the guarantee is intended to cover part only of the *Limited guarantee*

principal debt, or the whole of the debt with a limited liability.

Ellis v. *Emanuel* (1876) 1 Ex. D. 157.

[*E. g.*, if A guarantees to B "up to £1000" a debt of £5000 owing to B by C, then, so long as £1000 of that debt remains owing to B, A will be liable to pay £1000. But if A guarantees to B "a thousand pounds of the £5000 owing to B by C," then, if, in C's bankruptcy, B receives a dividend of 2/– in the £, A will be entitled to credit for 2/– in the pound on a thousand pounds, *i. e.* for £100 (*Hobson* v. *Bass* (1871) L. R. 6 Ch. App., at p. 794).]

Default of principal debtor

663. Immediately upon the default of the principal debtor, the liability of the surety becomes a primary liability. In the absence of agreement, it is not a condition precedent of such liability that the creditor should give the surety notice of such default,[a] or that the creditor should take any steps to enforce his claim against the principal.[b]

(a) *Walton* v. *Mascall* (1844) 13 M. & W. 452.
Price v. *Kirkham* (1864) 3 H. & C. 437.
(b) *Wright* v. *Simpson* (1802) 6 Ves., at p. 734.

Indemnity of surety

664. The surety is entitled to be indemnified by the principal debtor against all liability and loss incurred by him under the contract of guarantee, in consequence of the principal debtor's default.[a] Such loss includes interest on any sum which the surety may have been called upon to pay to the creditor.[b]

(a) *Toussaint* v. *Martinnant* (1787) 2 T. R. 100.
Badeley v. *Consolidated Bank* (1886) 34 Ch. D., at p. 556.
(b) *Ex parte Bishop* (1880) 15 Ch. D., at p. 421.

When claimable

665. The surety may claim indemnity from the principal debtor, even before default,[a] and before the surety has made any payment to the creditor,[b] and though the liability against which he claims indemnity is merely contingent;[c] but he cannot, by discharging the principal's debt to the creditor before it accrues due, make the principal his debtor for the amount so paid.[d]

(a) *Cruse* v. *Paine* (1868) L. R. 6 Eq. 641.
Johnson v. *Salvage Association* (1887) 19 Q. B. D., at p. 460.
(b) *Lacey* v. *Hill* (1874) L. R. 18 Eq., at p. 191.
(c) *Hobbs* v. *Wayet* (1887) 36 Ch. D. 256.
(d) Because such a payment is voluntary (*Sleigh* v. *Sleigh* (1850) 5 Exch. 514).

Remedies of surety

666. Upon the default of the principal debtor, the surety may, if the creditor refuses to sue, either (*a*) take proceedings to compel the principal debtor to exonerate him from liability, or (*b*) himself pay the creditor and sue the principal debtor for the amount paid.

Antrobus v. *Davidson* (1817) 3 Mer., at p. 579.
Davies v. *Humphreys* (1840) 6 M. & W. 153.
Wooldridge v. *Norris* (1868) L. R. 6 Eq. 410.
Green v. *Wynn* (1869) L. R. 4 Ch. App., at p. 207.
Bechervaise v. *Lewis* (1872) L. R. 7 C. P., at p. 377.

[The nature of this equitable remedy does not clearly appear from the cases. Apparently the surety should make the creditor a party to his action; and the court will then order payment to the creditor by the principal debtor of the amount due. *Semble*, the surety, who has not satisfied the creditor's claim, cannot insist on payment to himself. (*Lacey* v. *Hill* (1874) L. R. 18 Eq. 182; *Wolmershausen* v. *Gullick* [1893] 2 Ch. 514.) A surety may sue under this § *toties quoties* he makes a payment on account of the principal debt (*ibid.*).]

Subrogation

667. The surety who has discharged the principal debtor's liability to the creditor is entitled to have assigned to or in trust for him every security held by the creditor in respect of such liability, and to stand in the place of the creditor, and to use all the creditor's remedies, and, upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor or any co-surety indemnity, in whole or in a just proportion, for the loss or liability sustained by him.

Mercantile Law Amendment Act, 1856, *s.* 3.
Bechervaise v. *Lewis* (1872) L. R. 7 C. P., at p. 377.

Set-off

668. The surety who is sued by the creditor may claim the benefit of any right of set-off which the principal debtor could plead in answer to the creditor's claim.

Murphy v. *Glass* (1869) L. R. 2 P. C. 408.

Contribution by co-sureties

669. Where there are co-sureties, whether their liability as such is joint or several, or joint and several, and whether it arises under one or more than one contract,[a] and whenever it arose, and whether the fact of the co-suretyship was known to each co-surety or not,[b] any one surety who has discharged more than his proportion of the principal debtor's liability,[c] may claim contribution from his co-sureties (and

from the representatives of a deceased co-surety) proportionate to the amount for which each is surety.[d]

(a) *Deering* v. *Lord Winchelsea* (1787) 1 Cox, 318.
Ex parte Gifford (1802) 6 Ves., at p. 808.
(b) *Whiting* v. *Burke* (1870) L. R. 10 Eq. 539; 6 Ch. App. 342.
(c) *Davies* v. *Humphreys* (1840) 6 M. & W., at p. 168.
Batard v. *Hawes* (1853) 2 E. & B. 287.
(d) *Ellesmere Brewery Co.* v. *Cooper* [1896] 1 Q. B. 75.

Only solvent co-sureties reckoned

670. In estimating the amount due as contribution, account is taken only of such sureties as are solvent at the date of the claim for contribution.

Peter v. *Rich* (1629) 1 Ch. Rep., at p. 34.
Hitchman v. *Stewart* (1855) 24 L. J. Ch. 690.
Lowe v. *Dixon* (1885) 16 Q. B. D. 458.
Ellesmere Brewery Co v. *Cooper*, *ubi sup.*

Exoneration

671. Proceedings for exoneration may be commenced by a surety against his co-sureties, even before payment; but no claim to contribution can be established except in respect of money actually paid.

Ex parte Snowdon (1881) 17 Ch. D. 44.

[A surety-plaintiff cannot sue his co-surety *toties quoties* he makes a payment on account, until it is clear that he has paid more than his proportion (*Davies* v. *Humphreys* (1840) 6 M. & W. 153).]

Share of securities

672. A surety who is entitled to contribution from a co-surety is entitled *pro ratâ* to the benefit of every security held by such co-surety in respect of the guaranteed debt, whatever was the date at which such security was given, and whether such surety knew

or did not know of its existence when he gave his guarantee.

Steel v. *Dixon* (1881) 17 Ch. D., at p. 832.
Duncan, Fox & Co. v. *N. & S. Wales Bank* (1880) L. R. 6 App. Ca. 1.

Discharge of surety by extinction of debt

673. Subject to the provisions of § 675, the surety is discharged by any transaction between the creditor and the principal debtor by which the principal debt is extinguished.

Moss v. *Hall* (1850) 5 Exch., at p. 49 (per Parke, B.).

Discharge by indulgence

674. Subject as aforesaid, the surety is discharged if the creditor enters into a binding contract with the principal debtor to give him time for payment,[a] but not by the mere fact that the creditor forbears to sue,[b] or is remiss in suing,[c] or takes a further security from the principal debtor.[d]

(a) *Howell* v. *Jones* (1834) 1 Cr. M. & R., at p. 107.
Swire v. *Redman* (1876) 1 Q. B. D., at p. 541.
Polak v. *Everett* (1876) 1 Q. B. D. 669.
Clarke v. *Birley* (1889) 41 Ch. D. 422.
(b) *Strong* v. *Foster* (1855) 17 C. B., at p. 215.
(c) *Goring* v. *Edmonds* (1829) 6 Bing. 94.
(d) *Twopenny* v. *Young* (1824) 3 B. & C. 208.
Bell v. *Banks* (1841) 3 M. & G. 258.

Unless rights reserved

675. A creditor who makes a composition with, or gives time to, a principal debtor, can do so with an express reservation of his right of recourse against

the surety. In such a case, the surety's rights to indemnity and contribution, and all incidental rights, remain unimpaired.

Kearsley v. *Cole* (1846) 16 M. & W. 128.
Owen v. *Homan* (1853) 4 H. L. C. 997.
Boaler v. *Mayor* (1865) 19 C. B. N. S. 76.
Green v. *Wynn* (1869) L. R. 4 Ch. App. 204.

[No such reservation can be made upon a *release* of a principal debtor, the two things being inconsistent (*Kearsley* v. *Cole* (*ubi sup.*), at p. 136, per Parke, B.).

But where there is such reservation, the so-called release will sometimes be construed as a covenant not to sue (*Green* v. *Wynn*, *ubi sup.*, at p. 206).]

Discharge by variation

676. The surety is discharged by any variation, made without his consent, of the liability of the principal debtor, or of any co-surety, to the creditor, unless it is self-evident that such variation is unsubstantial, or one which cannot prejudice the surety.

Holme v. *Brunskill* (1877) 3 Q. B. D., at p. 505.
Taylor v. *Bank of N. S. Wales* (1886) L. R. 11 App. Ca. 596 (P. C.).
Bolton v. *Salmon* [1891] 2 Ch. 48.

Discharge by prejudicial action

677. The surety is discharged if the creditor does any act in connection with the liability of the principal debtor injurious to the surety or inconsistent with his rights, or if the creditor omits to perform any duty and, by such omission, injury is caused to the surety.

Dawson v. *Lawes* (1854) 23 L. J. Ch. 434.
Watts v. *Shuttleworth* (1861) 7 H. & N. 353.
Durham v. *Fowler* (1889) 22 Q. B. D., at pp. 405 and 419.

Abandonment of security by creditor

678. If the creditor surrenders a security, or negligently fails to enforce a security, or if he allows a security to be impaired or to deteriorate, the surety is discharged *pro tanto.*

Pearl v. *Deacon* (1857) 24 Beav. 186.
Wulff v. *Jay* (1872) L. R. 7 Q. B. 756.
Taylor v. *Bank of N. S. Wales* (1886) L. R. 11 App. Ca., at p. 603 (P. C.).

[Where the surety is personally discharged, any property which he may have given as security to the creditor is discharged also. (*Bolton* v. *Salmon* [1891] 2 Ch. 48).]

Death of surety

679. A continuing guarantee comes to an end so soon as the creditor has notice of the surety's death, unless the whole of the consideration moving from the creditor has been wholly performed before such notice has been given, or unless a contrary intention appears from the terms of the contract.[a] But the death of one co-surety does not relieve a surviving co-surety from future liability.[b]

(a) *Coulthart* v. *Clementson* (1879) 5 Q. B. D. 42 (per Bowen, J.).
Lloyd's v. *Harper* (1880) 16 Ch. D. 290.
And see *In re Silvester* [1895] 1 Ch. 573.
(b) *Beckett* v. *Addyman* (1882) 9 Q. B. D. 783.

Change of partnership

680. Where the creditor or the principal debtor is a partnership firm, the liability of the surety, in case of a change in the constitution of the firm, is governed by the provisions of § 616.

Partnership Act, 1890, s. 18.

Release of co-surety

681. When the creditor releases one of two or more sureties who have contracted jointly, or jointly and severally, the other or others are discharged.[a] But where the liability of the co-sureties released is a several liability, the other surety or sureties are not discharged by such release.[b]

(a) *Mercantile Bank of Sydney* v. *Taylor* [1893] A. C. 317.
(b) *Ward* v. *National Bank of New Zealand* (1883) L. R. 8 App. Ca. 755.

[*Semble*, in the latter case the right of contribution against the released co-surety is unaffected by the release.]

Bankruptcy of principal debtor

682. In case of the bankruptcy of the principal debtor, an order of discharge of such principal debtor, or the acceptance by the creditor of a composition or scheme under the Bankruptcy Act, 1883, does not discharge the surety.

Bankruptcy Act, 1883, s. 30 (4).
Bankruptcy Act, 1890, s. 3 (19).

Proof by surety in bankruptcy

683. The surety may prove in the bankruptcy of the principal debtor, or of a co-surety, even though he has not been called upon to satisfy the claim of the creditor.

Bankruptcy Act, 1883, s. 37 (3) (8).
Ex parte Bolmar (1890) 38 W. R. 752.
Wolmershausen v. *Gullick* [1893] 2 Ch. 514.
In re Paine [1897] 1 Q. B. 122.

Indemnity for costs

684. When the surety has unsuccessfully defended an action brought by the creditor on the guarantee, he cannot, in an action for indemnity against the principal debtor, or for contribution from a co-surety, recover the costs of such defence, unless in defending the action he has acted as a reasonable and prudent man, unindemnified, would have acted in his own case.

Roach v. *Thompson* (1830) Moo. & M. 487.
Beech v. *Jones* (1848) 5 C. B. 696.
Broom v. *Hall* (1859) 7 C. B. N. S. 503.
Hammond v. *Bussey* (1887) 20 Q. B. D. 79.

Third-party proceedings

685. When an action is brought against the surety by the creditor, the surety may, by taking "third-party proceedings," have any person against whom he has a claim to indemnity or contribution made a party.

R. S. C., 1883, Ord. XVI. rr. 48–55.
Ex parte Young (1881) 17 Ch. D., at p. 670.

SECTION X

INSURANCE

686. A contract of insurance is a contract whereby one party ("the insurer") agrees with another ("the insured"), in consideration of a payment or series of payments ("premium"), to pay to the latter or to his representatives or nominee (§ 693) a sum or sums of money conditionally on death or the happening of any uncertain event, which it is contemplated will or may cause loss or expense to the insured or such nominee ("interest" or "insurable interest"). *Definition*

687. Except as provided by § 226 (*ante*, Book II, Part I), no special form is required for the contract of insurance. But the name or names of the persons interested must be inserted in every policy of insurance[a] (? other than policies effected with a registered Friendly Society, and certain assurances of money payable on the deaths of children under ten, effected with an industrial assurance company[b]); and all contracts of insurance not to be performed within a *Form*

year from the making thereof are subject to the provisions of § 220(c) (*ante*, Book II, Part I).

(a) Life Assurance Act, 1774, s. 2.
Marine Insurance Act, 1788, s. 1. (In the case of policies affected by this Act, the names of the consignors, consignees, or insurance agents may be substituted for those of the persons interested).
(b) Collecting Societies and Industrial Assurance Companies Act, 1896, s. 13 (2). *Atkinson* v. *Atkinson* (1895) W. N. 114.
(c) Statute of Frauds (1677), s. 4.

[In practice all contracts of insurance are contained in a written form called a "policy." By the Stamp Act, 1891, s. 100, every person who receives a premium, or pays or allows money on any insurance, other than a sea insurance, except under a policy duly stamped, incurs a fine of £20. There is an exemption of policies issued by a registered Friendly Society (Friendly Societies Act, 1896, s. 33.)]

Necessity for insurable interest

688. A contract of insurance is not binding on the parties unless the insured has a (pecuniary) interest in the event insured against.

Marine Insurance Act, 1745, s. 1; Life Assurance Act, 1774, s. 1; *Halford* v. *Kymer* (1830) 10 B. & C. 724.
[But it may be treated as valid for ascertaining the rights of third persons (*Worthington* v. *Curtis* (1875) 1 Ch. D. 419; *A. G.* v. *Murray* [1904] 1 K. B. 165).]

But: —

(a) in the case of a contract of life insurance, it is sufficient if the interest exists at the time of the making of the contract, though it may afterwards cease to exist in whole or in part;

Dalby v. *India & London Life Assurance Co.* (1854) 15 C. B. 365.
Law v. *London Indisputable L. I. Co.* (1855) 1 K. & J. 223.

(b) in the case of a contract of marine insurance,

it is sufficient if the interest exists at the time of the risk arising.

Rhind v. *Wilkinson* (1810) 2 Taunt. 237.

In the case of a contract of fire insurance, and (probably) of all other kinds of insurance, the interest must exist both at the time of the making of the contract and at the time of the happening of the event insured against.

Lynch v. *Dalzell* (1729) 4 Bro. P. C. 431.
Sadler's Co. v. *Badcock* (1743) 2 Atk. 554.

[The strictness of this rule appears to make the benefit of such insurances unassignable without the consent of the insurer. Policies of life and marine insurance were expressly made assignable at law by the Policies of Assurance Acts 1867 and 1868 respectively.]

Duty of disclosure

689. In every contract of insurance it is the duty of the insured to disclose to the insurer at the time of the making of the contract all material facts within his knowledge which might influence the judgment of the insurer with regard to the contract contemplated (*uberrima fides*).

London Assurance v. *Mansel* (1879) 11 Ch. D. 363, and cases therein cited.
Seaton v. *Heath* [1899] 1 Q. B. 782.

Indemnity

690. The insured cannot (generally) recover from the insurer more than a sum sufficient to indemnify him against the loss actually sustained; but in the case of contracts of life insurance (including endow-

ment and annuity policies) the whole amount agreed to be paid, not exceeding the value of the interest at the date of the contract, may be recovered.

Dalby v. *India & London Life Assurance Co.* (1854) 15 C. B. 365.
Law v. *London Indisputable L. I. Co.* (1855) 1 K. & J. 223.
Hebdon v. *West* (1863) 3 B. & S. 579.

[Except where the only interest in the life insured is a definite or readily ascertainable sum of money, *e.g.*, where a creditor insures the life of his debtor (*Hebdon* v. *West*, *ubi sup.*) the Courts would probably never attempt to estimate the value of the loss caused by death. And it is believed that, even in the excepted case, professional insurers (*i. e.*, insurance companies and underwriters) now rarely resist claims for the full amount of the policy, if, in fact, any interest at all remains at the death. — Ed.]

Rebuilding after fire

691. In the case of a fire insurance on a building, when a loss has occurred, the insurance company may, and, on the request of any party interested in the building, must, cause the insurance money to be expended in reinstating the building.

Fires Prevention (Metropolis) Act, 1774, s. 83.

[*Quære*, whether the provisions of this section apply beyond the limits of the Metropolis.]

Subrogation

692. An insurer who has paid money under a contract of insurance is entitled, for the purpose of recovering the sum so paid, to stand in the place of the insured in respect of all remedies, rights of action, and securities available to the insured, as well as to recover from the insured all sums which the insured has received, or with due diligence might

have received, from other sources in respect of the same loss.

Castellain v. *Preston* (1883) 11 Q. B. D., at p. 388.
West of England Fire Insurance Co. v. *Isaacs* [1897] 1 Q. B. 226.

[But the insurer cannot recover mere gratuities or benevolences received by the insured without claim of right (*Burnand* v. *Rodocanachi* (1882) L. R. 7 App. Ca. 333).]

Matrimonial policies

693. A policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, creates a trust in favour of the objects therein named; and the moneys payable under any such policy do not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or become subject to his or her debts. But if it is proved that the policy was effected and the premiums paid, with intent to defraud the creditors of the insured, the latter are entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid.

Married Women's Property Act, 1882, s. 11.

Insurance of children

694. Insurances effected with Friendly Societies and Industrial Assurance Companies on the lives

of children are governed by the provisions of the Friendly Societies Act, 1896.

Friendly Societies Act, 1896, ss. 62–67, 84.
Collecting Societies and Industrial Assurance Companies Act, 1896, s. 13.

Nature of insurable interest

695. Subject to §§ 693, 694, no man is presumed, by the mere fact of the relationship, to have an interest in the life of his wife,[a] child,[b] brother, sister,[c] or creditor;[d] but a wife has an interest in the life of her husband,[e] a man or woman in that of his or her debtor or co-surety,[f] and (presumably) an infant, but not an adult,[g] in that of his parent. Every person is deemed to have an unlimited interest in his own life.[h]

(a) So stated by the textbooks (*e. g.* Bunyon, p. 22 ; Porter, p. 42). But the only authority quoted (*Halford* v. *Kymer*) does not touch the point. And it is believed that the practice is the other way. — Ed.

(b) *Halford* v. *Kymer* (1830) 10 B. & C. 724. (There is an exception in the case of certain policies validated by the Friendly Societies Act, 1896).

(c) *Barnes* v. *London &c. Insurance Co.* [1892] 1 Q. B. 864. (In this case a special interest was proved.)

(d) *Hebdon* v. *West* (1863) 3 B. & S. 579.

(e) *Reed* v. *Royal Exchange Co.*. (1796) 2 Peake (Add. Ca.) 70.

(f) *Godsall* v. *Boldero* (1807) 9 East, 72.

(g) *Shilling* v. *Accidental Co.* (1857) 2 H. & N. 42.
Harse v. *Pearl Assurance Co.* [1904] 1 K. B. 558.

(h) It might be difficult to find express authority for the elementary proposition, which is, however, assumed in the great majority of the life insurance cases that come before the courts.

Wagering policies

696. All contracts of insurance made by way of gaming or wagering (Section XI) are void.

Life Assurance Act, 1774, s. 1.

SECTION XI

GAMING AND WAGERING

Wagering contracts void

697. All contracts by way of gaming or wagering are null and void, and, subject to §§ 698–700, and § 704, no action may be brought or maintained for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made.

Gaming Act, 1845, s. 18.

[The Courts have, with their habitual caution, shrunk from attempting an exhaustive definition of the qualities of "gaming" or "wagering," though there have been judicial observations on the point. (See remarks of Hawkins, J., in *Carlill* v. *Carbolic Smoke Ball Company* [1892] 2 Q. B., at p. 492; and of Herschell, L. C., in *Forget* v. *Ostigny* [1895] A. C., at p. 323.) It would seem that the notion of a "sport" or "pastime" as well as that of a "bet" (*Lockwood* v. *Cooper* [1903] 2 K. B. 428) is an essential element in the first term, while in the second the idea of a "bet" is alone involved. But this distinction, though it may emphasize the difference between an appeal to skill and an appeal to pure chance, does not solve the difficulty. Perhaps the essence of a gaming contract is, that the rights of the parties are made to depend upon an event which, though it may be the result of the exercise of skill, would not, in the natural order of things, produce economic gain or loss to the parties reasonably commensurate with the thing stipulated for. If it would, the contract is one of legitimate insurance. In a wagering contract, the parties stand to gain or lose upon an event or fact which it is presumably beyond their

power to influence or affect, though it may not be a matter of "chance" in the ordinary acceptation of the term. *E. g.*, a bet upon the shape of the earth is a "wager." — Ed.]

Recovery of stake from stakeholder

698. Notwithstanding § 697, a party to a wager who has deposited a sum of money or valuable thing with a stakeholder, to abide the event of a wager, is entitled to reclaim such money or thing, unless it has been paid over or delivered to the winner in pursuance of the wager before the depositor has given notice to the stakeholder not to deliver or pay it over.

Hampden v. *Walsh* (1876) 1 Q. B. D. 189.
O'Sullivan v. *Thomas* [1895] 1 Q. B. 698.
Burge v. *Ashley* [1900] 1 Q. B. 744.

Recovery of stake from other party

699. When money is deposited as a stake by one party with the other party to abide the event of a wager, it may be reclaimed by the depositor at any time before the happening of the event.

Strachan v. *Universal Stock Exchange* (No. 2) [1895] 2 Q. B. 697.
In re Cronmire [1898] 2 Q. B., at p. 397.

[Can a winner recover his own stake after the event?]

"Cover"

700. Securities deposited as "cover" by one party to a wager with the other are not deposited to "abide the event" within the meaning of § 697, and are recoverable by the depositor, either before

or after the decision of the wager.[a] Securities so deposited can be followed into the hands of a transferee, unless they are negotiable instruments and have been taken without notice by a *bona fide* purchaser.[b]

(a) *Universal Stock Exchange* v. *Strachan* [1896] A. C. 166.
(b) *Strachan* v. *Universal Stock Exchange* [1895] 2 Q. B., at p. 329, (per Lord Esher, M. R.).

Subscription to prizes

701. A subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game or sport, pastime, or exercise, is not a gaming or wagering contract within the meaning of § 697.

Gaming Act, 1845, s. 18.

[This § does not exclude from the operation of § 697 a case in which the parties to the wager are themselves the contributors, *e. g.* an agreement to walk a match for £200 a side (*Trimble* v. *Hill* (1880) L. R. 5 App. Ca. 342; *Diggle* v. *Higgs* (1877) 2 Ex. D. 422; *Lockwood* v. *Cooper* [1903] 2 K. B. 428).

"Lawful game" means any game not unlawful by statute or common law. The Gaming Acts of 1738, 1739, and 1744 declare the following games to be unlawful, as falling within the scope of the Lottery Acts, viz.: ace of hearts, pharaoh, basset, hazard; passage and other games with dice, except backgammon; roulet or roly poly.]

Alleged wagers

702. What in fact were the intentions of the parties to a transaction alleged to be a wager is a question

for the jury.[a] A contract may be a wagering contract, though not apparently so on the face of it.[b]

(a) *Universal Stock Exchange* v. *Strachan* [1896] A. C. 166.
(b) *Hill* v. *Fox* (1859) 4 H. & N. 359.
Carlill v. *Carbolic Smoke Ball Co.* [1892] 2 Q. B., at p. 492 (per Hawkins, J.).

[*Semble*, there must be a wagering intention in both parties to the contract (per Hawkins, J., *ubi sup.*).]

Money paid on wager

703. Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract falling within § 697, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract or of any services in relation thereto, or in connection therewith, is null and void; and no action may be brought or maintained to recover any such sum of money.

Gaming Act, 1892, s. 1.

[*E. g.* if A, at B's request, settles B's debts for lost wagers, A is precluded by this § from recovering from B the sums so paid by him (*Tatam* v. *Reeve* [1893] 1 Q. B. 44). Or if A entrusts money to B for the purpose of betting on their joint account, A cannot claim indemnity from B in respect of any portion of the losses (*Saffery* v. *Mayer* [1901] 1 K. B. 11).

Money received on wager

704. Notwithstanding § 697, if one person makes bets as agent for another, and wins, the principal may maintain an action to recover from the agent any moneys received by him in payment of the bets.

Bridger v. *Savage* (1885) 15 Q. B. D. 363.
De Mattos v. *Benjamin* (1894) 63 L. J. Q. B. 248.

[Money lent to enable the borrower to pay his lost bets could be recovered before the Gaming Act, 1892. (*Ex parte Pyke* (1878) 8 Ch. D. 754). *Quære* since the Act. *Quære*, money lent to enable the borrower to make bets.]

Securities for gambling debts

705. Every note, bill, or mortgage, given in whole or in part for any money or valuable thing won by gaming or by betting upon any game or pastime, or for repaying any money lent for such gaming or betting, or lent at the time or place of such play, to any person so gaming or betting, is deemed and taken to have been made, drawn, accepted, given, or executed, for an illegal consideration.

Gaming Act, 1835, s. 1.

[The result of this rule is, briefly, that the holder of such an instrument must show that he gave value for it. Even then he will not be able to enforce it, if the other party shows that he (the holder) was aware of the illegality when he paid his money.]

Stock Exchange transactions

706. The provisions of this Section extend to transactions in stocks and shares, so far as they are wagers and not genuine contracts of purchase and sale.

Grizewood v. *Blane* (1851) 11 C. B., at p. 538.
Thacker v. *Hardy* (1878) 4 Q. B. D. 685.
Forget v. *Ostigny* [1895] A. C. 318 (P. C.).

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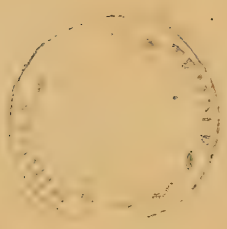

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